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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 88.

THOMAS CRAIG, ADMINISTRATOR OF THE ESTATE OF JOHN CARBRY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 6, 1888.

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1 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Thomas Craig, administrator of the estate of John Carbry, deceased, plaintiff, and The Continental Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said Thomas Craig, administrator as aforesaid, plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court Eastern District of Michigan.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 24 day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for the Eastern District of Michigan.

Allowed by—
H. B. BROWN,
Dist. Judge.

[Endorsed:] 7122. Craig, adm'r, *vs.* Continental Ins. Co. Writ of error. Filed Dec. 24, 1887. Walter S. Harsha, clerk.

We admit due service of the within writ.
Dec. 24, 1887.

MOORE & CANFIELD,
Att'ys for Def't.

2 The United States of America to the Continental Insurance Company of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the

eastern district of Michigan, wherein Thomas Craig, administrator of the estate of John Carbry, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan, this 24 day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

HENRY B. BROWN,
District Judge.

3 [Endorsed:] 7122. Craig, adm'r, *v.* Continental Ins. Co. Citation. Filed Dec. 24, 1887. Walter S. Harsha, clerk.

We admit due service of the within citation.
Dec. 24, 1887.

MOORE & CANFIELD,
Att'ys for Def't.

4 *Bond on Writ of Error.*

Know all men by these presents that Thomas Craig, administrator of the estate of John Carbry, deceased, as principal, and Thomas Craig, individually, as surety, — held and firmly bound unto the Continental Insurance Company in the sum of two hundred dollars ($200.00), lawful money of the United States of America, to be paid to the said above-named obligee or to its certain attorney, heirs, executors, administrators, or assigns, and to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, administrators, and successors and each and every of them, firmly by these presents.

Sealed with our seals. Dated the 24th day of December, one thousand eight hundred and eighty-seven.

The condition of this obligation is such that whereas lately, at a session of the circuit court of the United States for the eastern district of Michigan, in a suit depending in said court between said Thomas Craig, administrator of the estate of John Carbry, deceased, judgment was rendered against said above-bounden Thomas Craig, administrator of said estate, and the said Thomas Craig, administrator as aforesaid, having obtained a writ of error to reverse said judgment, and a citation, according to the rules and practice of said court:

Now, therefore, if the said Thomas Craig, administrator, shall prosecute his said writ of error to effect and answer all costs if he fail to make his plea good, then this obligation to be void; else to remain in full force and virtue.

THOMAS CRAIG, [L. S.]
Administrator of the Estate of John Carbry, Deceased.
THOS. CRAIG. [L. S.]

Approved:
H. B. BROWN.

We assent to sufficiency of above bond.

MOORE & CANFIELD,
Att'y- for Def't.

Filed Dec. 24, 1887.

WALTER S. HARSHA, *Clerk.*

5 *Transcript on Removal.*

Dated JUNE 25, 1884.

THOMAS CRAIG, Adm'r of Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY *et al.*

STATE OF MICHIGAN:

The Superior Court of Detroit.

On filing declaration in this cause pursuant to the statute authorizing the commencement of suits by declaration, and on motion of Dickinson, Thurber & Hosmer, Esqs., attorneys for the plaintiff, it is ordered that the defendants in said cause appear and plead to the said declaration within twenty days after service upon them of a copy thereof and notice of this rule or judgment, &c.

DICKINSON, THURBER & HOSMER,
Pl'ff's Attorneys.

6 Superior Court of Detroit.

STATE OF MICHIGAN, } *ss:*
County of Wayne, City of Detroit,

Thomas Craig, administrator of the estate of John Carbry, deceased, who was at the time of his death, as the plaintiff now is, a resident of the city of Detroit, complains of the Continental Insurance Company, a body corporate created and existing under the laws of the State of New York; the Union Insurance Company of Philadelphia, a corporation created and existing under the laws of the State of Pennsylvania; the Insurance Co. of the State of Pennsylvania, a corporation created & existing under the laws of the State of Pennsylvania, and the Thames & Mersey Marine Insurance Company, Limited, which is a body corporate created and existing under the laws of the Kingdom of Great Britain, all of which said defendants have an office in the city of Detroit, and at all time hereinafter mentioned since then and now have been and are carrying on the business of marine insurance companies by compliance with and under the laws of Michigan confining and regulating the authority of such companies not incorporated under the laws of Michigan to carry on their business in this State, in a plea of trespass on the case, filing this declaration as commencement of suit, for that whereas heretofore, to wit, on and before November 20th, 1883, the said defendants were severally insurers of the good ship steam-barge Enterprise, a water craft or vessel engaged in the carrying trade on the

Great Lakes, rivers, and canals there connecting, against marine risks, and afterwards, to wit, on the day and year last aforesaid, the said steam-barge "Enterprise," while pursuing a voyage on the said lakes in thick and storming weather, while being navigated by her crew, ran upon the rocks off or at Green island, in the northern part of Lake Huron; that then and there said Enterprise, moved by the winds and waves, pounded heavily upon the said rocks during all of the night of the day aforesaid, and there she remained exposed to inclement weather and to the wrenching and straining necessarily incident to her position until she sank and was abandoned by her captain and crew; and afterwards, to wit, on or about the 5th day of December, A. D. 1883, as plaintiff avers, the owners, the captain, and the crew of the said Enterprise having abandoned her, the said defendants took entire and complete charge and control of the said Enterprise to the exclusion of all others, with the purpose and object of saving and rescuing something of value of the said wreck to indemnify themselves in whole or in part against their several obligations under their contracts of insurance aforesaid.

And plaintiff avers that John Carbry, deceased, was, to wit, on the day and year last aforesaid, a helper to the engineer and manager in charge of certain steam-pumps, and said defendant applied to the said engineer & manager for the use of the said steam-pumps in and about the salvage of the said Enterprise, and to said Jno. Carbary to go with the said pumps and aid the defendants in the service of said pumps in and about the salvage, and plaintiff
7 avers that, at their urgent solicitation, he consented to such application, and, upon their direction and under their invitation, go, taking with him the said pumps, upon wrecking tug of the said defendants, manned and officered by the said defendants and under their management and control, and was by them, through their agents in that behalf employed in and about the salvage aforesaid, carried upon the said tug to the scene of the said wreck.

And plaintiff avers that said John Carbry was not a sailor or in any way acquainted with the navigation of the lakes or the dangers thereof or with the perils incident thereto, as defendants well knew, and was not employed by the said defendants or their said agents to engage in any way in navigation or in any service in connection therewith, and by reason thereof and of the premises the said defendant ought carefully to have carried the said John Carbry and to have carefully managed and conducted the said voyage and to have carefully conducted all navigation and carefully provided against all dangers incident to the navigation and salvage in such cases well known and well understood by men well skilled to conduct and manage in the service of navigation the Great Lakes at that season on the entire voyage; yet the said defendants did not use due care, diligence, and skill in the conduct and management of said voyage and the business thereof and in carrying the said John Carbry as aforesaid, but the said defendants, not regarding their duty in that behalf, conducted the said voyage and the business thereof aforesaid so carelessly, negligently, and unskillfully that by

and through the wrongful acts, negligencies, ignorances, and defaults of their agents and servants in charge of the said voyage and business the death of the said John Carbry was caused, who was without any fault in the premises, as follows:

Plaintiff avers that the facts as to the cause of the wreck of the Enterprise *was* well known to the defendants and were unknown to the said John Carbry.

That said defendants were fully advised that said Enterprise had been pounding upon the rocks for days, that she was strained and badly wrenched, and that her bottom was broken.

That said defendants knew that then was the most dangerous season of navigation upon the lakes; that navigation was about closing; that staunch and strong vessels were laying up and would not venture forth, owing to the inclemency of the season, and that when the defendant brought the said John Carbry to the wreck the lake thereabout was calm, and that said Enterprise could be safely kept near or about said island until the opening of navigation the succeeding season; that thereupon, on or about the said December 5th, 1883, the said defe-dants put the said Carbry and said pumps from said tug upon the said Enterprise and directed him to start pumps and pump her out, which was done, and then, as she would float when the pumps were worked, the said defendants attached her by a hawser to said tug and directed the said Carbry to remain about the Enterprise to keep the pumps going; that the defendants caused no examination of the bottom of said Enterprise; that the defendants took no measures or the ordinary precautions to prevent the action of the water from filling her through weak and broken places which might be opened by the action of towing her or by heavy weather; that said defendants did not provide the ordinary means of escape in case of accident, or any equip-ed or
8 serviceable small boat or yawl. The said defendant- so provided by the manner of towing and the length of the tow-line that in case of sudden danger the tug could not come to the relief of the said Carbry on the said Enterprise; that in this condition of things the said defendants started with the said tug and said Enterprise directly across and down Lake Huron with the avowed purpose of reaching Detroit; that on or about December 9th, 1883, in the night time, a storm arose on Lake Huron; that from said tug the whistles on the pumps on said Enterprise were heard to blow repeatedly without attention from the defendants' agents on said tug, and that at about the hour of 3 o'clock in the morning on the 10th of December, 1883, off Port Austin, Michigan, the said Enterprise went down on Lake Huron, carrying down and drowning the said Carbry; that the defendants' agents on the said tug then cut the tow-line connecting with said Enterprise, and, instead of backing up to save the life of said Carbry, took time to round to and in that time the probability of rescuing life was gone.

Plaintiff avers that there were ports of safety accessible from the scene of said wreck which could have been reached without going out into the lake, and that after the leaving the place of the wreck the tug, with said Enterprise in tow, passed the safe and accessible

harbors of Alpena, Presque Isle, Tawas, and others; and plaintiff avers the following as specific acts of negligence of the defendants as causing and contributing to the death of said John Carbry:

The failure to examine the bottom of the Enterprise by means of a diver before trusting human life upon her; the absence of diving apparatus for that purpose; the failure to test the condition of the bottom by the well-known means of boring before putting Carbry upon the Enterprise; the failure to fasten down the timber boards or in any manner to investigate and repair, if needed, the inner sheathing or lining before risking Carbry's life upon her; the taking of the Enterprise into the lake in December with knowledge of the pounding she had received, at the risk of Carbry's life; the taking her across the lake instead of to the nearest port with Carbry upon her; the passing of safe harbors in ignorance of her condition or seaworthiness after notice of the poundin-s she had received, with Carbry upon her.

The failure to provide a small boat or small boats equipped and convenient in case of accident, with Carbry upon her; the towing of a boat in her condition, with Carbry upon her, at too great distance to rescue in case of accident; the failure to back up at a signal from the Enterprise and rescue Carbry; the failure to take Carbry from the Enterprise when the storm arose on the night of the accident; the carrying of Carbry upon the Enterprise after the experience she had had.

That said decedent was of the age of twenty-two years, and left him surviving three minor sisters and his mother, who are the next of kin and distributees of the estate, who were of the ages as follows at the time of his death, the said sisters being of the ages, respectively, as follows: twenty, eighteen, and sixteen, and the mother thirty-nine years at the time of the death of the decedent; that the said mother and sisters paid the funeral expenses of said deceased,

9 amounting to two hundred dollars, to the damage of said plaintiff and next of kin and distributees twenty-five thousand dollars; and said plaintiff shows that on the 25th day of January, A. D. 1884, he was appointed administrator — aforesaid decedent by the probate court for the county of Wayne, and that letters testamentary have issued to the plaintiff, which he here offers to produce in court.

Therefore brings suit.

DICKINSON, THURBER & HOSMER,
Pl'ff's Attorneys.

10 STATE OF MICHIGAN:

Superior Court of Detroit.

INSURANCE CO. OF THE STATE OF PENNSYLVANIA, Impleaded with The Continental Insurance Company of New York, The Union Insurance Co. of Philadelphia, and The Thames & Mersey Marine Insurance Company, Defendants,

ads.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased, Plaintiff.

The defendant The Insurance Company of Pennsylvania, by Maynard & Swan, its attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

MAYNARD & SWAN,
Att'ys for the Defendants, Insurance Company of the State of Pennsylvania.

To Dickinson, Thurber & Hosmer.

11 STATE OF MICHIGAN, } *ss:*
The Superior Court of Detroit, }

THE THAMES & MERSEY MARINE INSURANCE COMPANY, Impleaded with The Continental Insurance Co., The Union Insurance Co. of Philadelphia, and The Insurance Company of the State of Pennsylvania,

ads.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased.

The defendant The Thames and Mersey Marine Insurance Company, by Maynard & Swan, its attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

MAYNARD & SWAN,
Att'ys for Def't, The Thames-Mersey Marine Insurance Company.

12 In the Superior Court of Detroit.

THOMAS CRAIG, Administrator of Estate of John Carbry,
vs.
CONTINENTAL INSURANCE COMPANY OF NEW YORK *et al.*

And the said defendant, The Continental Insurance Company of New York, by Moore & Canfield, its attorneys, comes and demands a trial of the matters set forth in the declaration of the said plaintiff.

MOORE & CANFIELD,
Att'ys for Def't.

13 STATE OF MICHIGAN:

Superior Court of Detroit.

THE UNION INSURANCE COMPANY OF PHILADELPHIA, Impleaded with The Insurance Company of the State of Pennsylvania, The Continental Insurance Company of New York, and The Thames & Mersey Marine Insurance Company, Defendant-,
ads.
THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased, Plaintiff.

The defendant The Union Insurance Company of Philadelphia, by Maynard & Swan, its attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

MAYNARD & SWAN,
Att'ys for Union Ins. Co. of Philadelphia.

To Messrs. Dickinson, Thurber & Hosmer, att'ys for plaintiff.

14 STATE OF MICHIGAN:

In the Superior Court of Detroit.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased, Plaintiff,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, THE Union Insurance Company of the State of Pennsylvania, and The Thames & Mersey Marine Insurance Company of Great Britain, Defendants.

The petition of The Continental Insurance Company of New York, The Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames & Mersey Marine Insurance Company of Great Britain, the above-named defendants, respectfully represents to this honorable court:

1st. That your petitioner, the Continental Insurance Company of New York, at the time of the commencement of this suit was and still is a corporation organized and existing under the laws of the State of New York and a citizen of the State of New York.

2nd. That your petitioner, the Union Insurance Company of Philadelphia, at the time of the commencement of this suit was and still is a corporation organized and existing under the laws of the State of Pennsylvania and a citizen of the State of Pennsylvania.

3rd. That your petitioner, the Insurance Company of the State of Pennsylvania, at the time of the commencement of this suit was and still is a corporation organized and existing under the laws of the State of Pennsylvania and a citizen of the State of Pennsylvania.

4th. That your petitioner, the Thames and Mersey Marine Insurance Co., at the time of the commencement of this suit was and still is a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland and is an alien and

a citizen and a subject of the United Kingdom of Great Britain & Ireland.

5th. That Thomas Craig, the above-named plaintiff, at the commencement of this suit was and still is a resident of Detroit, in the eastern district of Michigan, and a citizen of the State of Michigan.

6th. That there is a controversy in this suit between the plaintiff, a citizen of the State of Michigan, and the above-named defendants, who are citizens, respectively, of the States — New York, Pennsylvania, and the United Kingdom of Great Britain and Ireland, as hereinabove set forth.

15 7th. That the matter in dispute in this cause exceeds the sum of five hundred dollars, exclusive of costs.

8th. That this cause can be fully and finally determined in the circuit court of the United States for the eastern district of Michigan.

9th. Your petitioners further show that this suit was commenced during the present July term of the court, and that the next or *or* September term of this court, commencing Tuesday, Sept. 2nd, 1884, is the first term at which this suit could be first tried since the said suit was commenced.

10th. Your petitioners make and file herewith a bond, with good and sufficient surety, for their entering into the circuit court of the United States for the eastern district of Michigan on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioners therefore pray this honorable court to accept this petition and said bond and to order the transfer and removal of this suit to the said circuit court of the United States for the eastern district of Michigan.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,
By MOORE & CANFIELD, *It- Attorneys.*
THE UNION INSURANCE COMPANY OF PHILADELPHIA,
By MAYNARD & SWAN, *Its Attorneys.*
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
By MAYNARD & SWAN, *Its Attorneys.*
THE THAMES & MERSEY MARINE INSURANCE COMPANY OF GREAT BRITAIN,
By MAYNARD & SWAN, *Its Attorneys.*

MOORE & CANFIELD,
Att'ys for Continental Insurance Company of New York.
MAYNARD & SWAN,
Attorneys for the Union Insurance Company of Philadelphia, the Insurance Company of the State of Pennsylvania, and the Thames & Mersey Marine Insurance Company of Great Britain.

16 Know all men by these presents that we, William V. Moore and Henry H. Swan, both of Detroit, Wayne county, Michigan, are held and firmly bound unto Thomas Craig, administrator of the estate of John Carbry, deceased, and all other persons whom it may concern, in the penal sum of five hundred dollars; for the payment whereof, well and truly — be made unto the said Thomas Craig, his heirs, representatives, or assigns, we bind ourselves, our heirs, executors, and administrators and each of them, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of August, A. D. 1884.

Whereas the said Thomas Craig, administrator of the estate of John Carbry, deceasad, as plaintiff, has commenced against The Continental Insurance Co. of New York, The Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames & Mersey Marine Insurance Company of Great Britain, as defendants, a certain suit in the superior court of Detroit; and whereas the said defendants have filed their petition in the said superior court of Detroit for the removal of said suit into the next circuit court of the United States for the eastern district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named Continental Insurance Company of New York, the Union Insurance Company of Philadelphia, the Insurance Company of the State of Pennsylvania, and the Thames & Mersey Marine Insurance Company of Great Britain or either of them shall enter or cause to be entered in the next circuit court of the United States for the eastern district of Michigan, on the first day of its next term or session, a copy of the record in the said suit so brought against them in the said superior court of Detroit as aforesaid, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States for the eastern district of Michigan if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise remain in full force and virtue.

Witness our hands and seals this 29th day of August, A. D. 1884.

WM. V. MOORE. [L. S.]
HENRY H. SWAN. [L. S.]

Approved by the court.
J. LOGAN CHIPMAN,
Judge of the Superior Court of Detroit.

17 The Superior Court of Detroit.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased, Plaintiff,
vs.
THE CONTINENTAL INSURANCE CO. OF NEW YORK, THE UNION Insurance Company of Philadelphia, The Insurance Co. of the State of Pennsylvania, and The Thames and Mersey Marine Insurance Company of Great Britain, Defendants.

Please take notice that we are retained for the defendants in the above-entitled cause, and that upon the petition of the said defendants and the bond accompanying the same, and copies of which said petition and bond are hereto annexed and upon the files and records of said cause, we shall move the said court, on Monday, the first day of September, A. D. 1884, at the opening of court in the morning of said day, or as soon thereafter as counsel can be heard, for an order staying all proceedings in the said suit and for leave to remove the same to the circuit court of the United States for the eastern district of Michigan, as prayed in the said petition.

(Signed) MOORE & CANFIELD,
Attorneys for the Continental Ins. Co. of N. Y.
MAYNARD & SWAN,
Attorneys for Union Ins. Co. of Philadelphia, the Insurance Co. of the State of Pennsylvania, and the Thames and Mersey Ins. Co. of Great Britain.

To Dickinson, Thurber & Hosmer, plaintiff's attorneys.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Henry H. Swan, being duly sworn, deposes — says that on the thirteenth day of August, A. D. 1884, he served a notice, of which the within is a true copy, upon the within-named Dickinson, Thurber & Hosmer, plaintiff's attorneys, by delivering the same to Don M. Dickinson, a member of the firm of Dickinson, Thurber & Hosmer, and that said notice — accompa-ied by copies of the within petition and bond.

HENRY H. SWAN.

Subscribed and sworn to this thir-ieth day of August, A. D. 1884, before me—

W. E. BAUBEE,
Deputy Clerk Superior Court of Detroit.

18 At a session of the superior court of Detroit held at the superior court-room, in the city of Detroit, on the 1st day of September, in the year one thousand eight hundred and eighty-four.

Present: The Hon. J. Logan Chipman, judge of the superior court of Detroit.

16 Know all men by these presents that we, William V. Moore and Henry H. Swan, both of Detroit, Wayne county, Michigan, are held and firmly bound unto Thomas Craig, administrator of the estate of John Carbry, deceased, and all other persons whom it may concern, in the penal sum of five hundred dollars; for the payment whereof, well and truly — be made unto the said Thomas Craig, his heirs, representatives, or assigns, we bind ourselves, our heirs, executors, and administrators and each of them, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of August, A. D. 1884.

Whereas the said Thomas Craig, administrator of the estate of John Carbry, deceasad, as plaintiff, has commenced against The Continental Insurance Co. of New York, The Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames & Mersey Marine Insurance Company of Great Britain, as defendants, a certain suit in the superior court of Detroit; and whereas the said defendants have filed their petition in the said superior court of Detroit for the removal of said suit into the next circuit court of the United States for the eastern district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named Continental Insurance Company of New York, the Union Insurance Company of Philadelphia, the Insurance Company of the State of Pennsylvania, and the Thames & Mersey Marine Insurance Company of Great Britain or either of them shall enter or cause to be entered in the next circuit court of the United States for the eastern district of Michigan, on the first day of its next term or session, a copy of the record in the said suit so brought against them in the said superior court of Detroit as aforesaid, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States for the eastern district of Michigan if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise remain in full force and virtue.

Witness our hands and seals this 29th day of August, A. D. 1884.

WM. V. MOORE. [L. S.]
HENRY H. SWAN. [L. S.]

Approved by the court.
J. LOGAN CHIPMAN,
Judge of the Superior Court of Detroit.

17 The Superior Court of Detroit.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased, Plaintiff,
vs.
THE CONTINENTAL INSURANCE CO. OF NEW YORK, THE UNION Insurance Company of Philadelphia, The Insurance Co. of the State of Pennsylvania, and The Thames and Mersey Marine Insurance Company of Great Britain, Defendants.

Please take notice that we are retained for the defendants in the above-entitled cause, and that upon the petition of the said defendants and the bond accompanying the same, and copies of which said petition and bond are hereto annexed and upon the files and records of said cause, we shall move the said court, on Monday, the first day of September, A. D. 1884, at the opening of court in the morning of said day, or as soon thereafter as counsel can be heard, for an order staying all proceedings in the said suit and for leave to remove the same to the circuit court of the United States for the eastern district of Michigan, as prayed in the said petition.

(Signed) MOORE & CANFIELD,
Attorneys for the Continental Ins. Co. of N. Y.
MAYNARD & SWAN,
Attorneys for Union Ins. Co. of Philadelphia, the Insurance Co. of the State of Pennsylvania, and the Thames and Mersey Ins. Co. of Great Britain.

To Dickinson, Thurber & Hosmer, plaintiff's attorneys.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Henry H. Swan, being duly sworn, deposes — says that on the thirteenth day of August, A. D. 1884, he served a notice, of which the within is a true copy, upon the within-named Dickinson, Thurber & Hosmer, plaintiff's attorneys, by delivering the same to Don M. Dickinson, a member of the firm of Dickinson, Thurber & Hosmer, and that said notice — accompa-ied by copies of the within petition and bond.

HENRY H. SWAN.

Subscribed and sworn to this thir-ieth day of August, A. D. 1884, before me—

W. E. BAUBEE,
Deputy Clerk Superior Court of Detroit.

18 At a session of the superior court of Detroit held at the superior court-room, in the city of Detroit, on the 1st day of September, in the year one thousand eight hundred and eighty-four.

Present: The Hon. J. Logan Chipman, judge of the superior court of Detroit.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY, THE UNION INSURANCE Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames and Mersey Marine Insurance Co. of Great Britain.

On reading and filing the petition of the defendants and the bond for the removal of said cause to the circuit court of the United States for the eastern district of Michigan, and on motion of the attorneys for said defendants, it is ordered that said bond and the sureties thereof be, and the same *is* hereby, approved; that said cause be certified to the circuit court of the United States for the eastern district of Michigan, and that all proceedings in this court be, and they are hereby, stayed according to the statute in such case made and provided.

19 STATE OF MICHIGAN, } ss:
County of Wayne, City of Detroit, }

I, John B. Molony, clerk of the superior court of Detroit, do hereby certify that the above and *go*regoing is a true and correct copy of paper filed and proceedings had and entered in the above-entitled cause by said court as appears of record in my office; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof.

In testimony whereof I have hereto set my hand and affixed the seal of the said superior court of Detroit this eighth day of October, A. D. 1884.

JOHN B. MOLONY, *Clerk*,
By W. E. BAUBIE,
[SEAL.] *Deputy Clerk.*

Endorsed: 7122. In the court of Detroit. Thomas Craig, admin'r estate of John Carbry, deceased, *vs.* The Continental Insurance Company *et al.* Transcript on removal of cause to U. S. circuit court. Filed Oct. 18, 1884. Walter S. Harsha, clerk.

20 *Stipulation for Costs.*

Circuit Court of the United States for the Eastern District of Michigan.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY, THE UNION INSURance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames and Mersey Marine Insurance Company, Limited.

Know all men by these presents that we, —— ——, of the city of

Detroit, are held and firmly bound unto Thomas Craig, administrator of the estate of John Carbry, deceased, plaintiff in the above-entitled cause, in the sum of $100, to be paid to the said plaintiff, his successors and assigns; for which payment, well and truly to be made, we bind ourselves, our heirs and administrators, firmly by these presents.

The conditions of this obligation is such that if the said Continental Insurance Company, one of the defendants in the above-entitled cause, shall pay and discharge all costs which may be adjudged against it in said cause, then this obligation shall be void; otherwise to remain in full force and virtue.

IRA WORCESTER.

Signed, sealed, and delivered this — day of November, 1884, in the presence of—

——— ———.

EASTERN DISTRICT OF MICH., *ss*:

Ira Worcester, being duly sworn, deposes and says that he is worth the sum of two hundred and fifty dollars in property subject to execution in said district over and above all indebtedness due from or owing by him.

IRA WORCESTER.

Subscribed and sworn to before me November 4th, '84.

WM. S. GREEN,
Notary Public, Wayne Co., Mich.

Endorsed: 7122. Circuit court U. S., east. dist. of Mich. Thomas Craig, adm'r of John Carbry, *vs.* The Continental Ins. Co. *et al.* Stipulation for costs. Filed Nov. 4, 1884. Walter S. Harsha, clerk.

21 *Stipulation for Costs.*

Circuit Court of the United States for the Eastern District of Michigan.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased, Plaintiff,
vs.
THE UNION INSURANCE COMPANY OF PHILADELPHIA, INSURANCE Company of the State of Pennsylvania, and The Thames & Mersey Marine Insurance Company, Limited, Impleaded with The Continental Insurance Company of New York, Defendants.

I, Stephen B. Grummond, acknowledge myself security for all costs for which the above-named defendants, The Thames & Mersey Marine Insurance Company, The Insurance Company of the State of Pennsylvania, and The Union Insurance Company of Philadelphia, may become liable in this suit.

S. B. GRUMMOND.

Detroit, November 11th, A. D. 1884.

Endorsed: 7122. U. S. circuit court, E. D. Mich. Thomas Craig, admin., etc., *vs.* The Union Ins. Co. *et al.* Security for costs. Filed in clerk's office Nov. 14, 1884. Walter S. Harsha, clerk.

22 At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the fourth day of November, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator, &c., *vs.* CONTINENTAL INSURANCE CO. *et al.* } Case Removed from Superior Court of Detroit.

On filing a transcript of all papers filed and proceedings had and entered in the court from which said cause was removed, and on motion of attorney for party removing the same, it is ordered that said cause be, and the same is hereby, entered in this court as of this day.

First Trial.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the sixteenth day of December, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator of Estate of John Carbry, Deceased, *vs.* THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, The Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames and Mersey Insurance Company.

The parties in this cause being — court, by their respective attorneys, ready for trial, thereupon comes a jury, namely, William T. Baer, George Irwin, Harvey H. Hitchcock, John Conway, Michael Thatcher, Norris O. Secley, James A. Tiller, Daniel Follinsbee, Daniel H. Covell, James Osmon, Martin P. Stockwell, and George C. Wyllis, good and lawful men, who are duly impaneled, tried, and sworn well and truly to try the issue between the parties and sit together and hear the opening statements of plaintiff's counsel.

23 *First Trial Continued.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on

Wednesday, the seventeenth day of December, in the year one thousand eight hundred and eighty-*seven*.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator of Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, THE Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames and Mersey Insurance Company.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear a portion of the evidence in the case.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the eighteenth day of December, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator of Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, THE Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames and Mersey Insurance Company.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear the conclusion of the evidence offered by the plaintiff; whereupon, on motion of Henry H. Swan, of counsel for the defendants The Union Insurance Company, Insurance Company of the State of Pennsylvania, and The Thames and Mersey Insurance Company, under the instructions of the court, without leaving their seats, say upon their oath that the defendants The Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames and Mersey Marine Insurance Company are not guilty of the premises in the plaintiff's declaration in this cause laid to their charge in manner and form as the said plaintiff hath therein alleged; whereupon the trial is proceeded with against the re-
24 maining defendant, The Continental Insurance Company of New York, and the jurors aforesaid sit together and hear further evidence in the case.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday,

the nineteenth day of December, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK *et al.*

In this cause the jurors heretofore impaneled and sworn come into court again and sit together and hear the conclusion of the evidence in the case and a portion of the arguments of counsel.

Verdict.

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the twentieth day of December, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator of Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK *et al.*

In this cause the jurors heretofore impaneled and sworn come into court again and sit together, and after hearing the conclusion of the arguments of counsel and the charge of the court retire under the charge of an officer of the court duly sworn for that purpose to consider of their verdict to be given, and after being absent for a time returned into court and say upon their oath that the said defendant, The Continental Insurance Company, is guilty of the premises in the plaintiff's declaration in this cause laid to its charge in manner and form as the said plaintiff hath therein alleged, and they assess the damages of the said plaintiff on occasion of the premises at the sum of eight thousand dollars.

25 *Time to Move for a New Trial Extended.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the twenty-second day of December, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator of Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK *et al.*

In this cause, on motion of Mr. F. H. Canfield, of counsel for the

defendant, it is ordered that the time to move for a new trial be extended ten days, and that in the meantime all proceedings in said cause be stayed.

Time to Settle a Bill of Exceptions Extended.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the twenty-sixth day of January, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator, &c.,
vs.
THE CONTINENTAL INS. CO.

In this cause, on motion of Moore & Canfield, attorneys for defendant, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended twenty days after decision of motion for new trial.

26 *Motion for New Trial.*

In the Circuit Court of the United States for the Eastern District of Michigan, Dec. 30, 1884.

THOMAS CRAIG, Adm'r of the Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, THE Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania. } 7122.

And now comes The Continental Insurance Company of New York, one of the defendants in the above-entitled cause, and moves the court that the verdict heretofore rendered in said cause be vacated and set aside and that a new trial be granted therein for the following reasons:

1. Because the court erred in admitting the testimony of witness Locke and the deposition of witness Delaney, taken before Coroner Locke, for the purpose of impeaching the testimony of said Delaney, given upon the trial of said cause, and in overruling the objection of defendants to the introduction of said impeaching testimony and the said depositions.

2. Because the court erred in refusing to charge as requested by defendant in its first, second, and third requests.

3. Because the court erred in refusing to charge as requested by defendant in its fifth request and in its modification of said request.

4. Because the court erred in refusing to charge as requested by

defendants in its eighth request and in the modification made by the court to said eighth request.

5. Because the court erred in refusing to instruct the jury as requested in defendant's tenth and eleventh requests respectively.

6. Because the court erred in not charging in accordance with the defendant's fourth request and in modifying said request so as to read as follows: "That there is no evidence in this cause of any direct contract between the plaintiff's intestate, Carbry, and the defendant insurance company, such as is set forth in the plaintiff's declaration, and if the jury find that the plaintiff's intestate went to the wreck as a salvor and not in the employ of another the defendant was under no legal obligation to insure the safety of the vessel while Carbry was upon her."

7. Because the court erred in charging the jury as follows: "To entitle the plaintiff to recover in this case he must establish by a preponderance of evidence, 1st, that Captain Rardon was acting as the agent of the defendant in conducting this expedition; 2d, that Captain Rardon was negligent in not taking proper precautions connected with the conduct of this expedition; 3rd, that said negligence on his part caused or contributed to the death of Carbry."

8. In charging the jury, as requested by plaintiff: "If you believe that Rardon was the agent of the Continental Insurance Company, having charge of its wrecking in cases where wrecks occurred
27 of vessels on which that company had marine risks, and that in the ordinary course of his business as such agent he took charge of the wrecking enterprise, then his acts and omissions must be held to be the acts and omissions of the Continental Insurance Company."

9. Because the court erred in charging the jury as follows:

"If you shall be of opinion that Captain Rardon was negligent himself in performing his duties, then, so far as this point is concerned, the plaintiff is entitled to recover, and that if Captain Rardon was acting as the agent of the Continental Insurance Company and was negligent in the management of the wrecking expedition, so that his negligence contributed to the death of John Carbry, plaintiff is entitled to recover. I should have added also that the negligence should have caused or contributed to the death of Carbry."

10. That the court erred in charging the jury as follows:

"It was Rardon's duty to make the expedition as safe as possible with the means he had at hand."

11. That the court erred in charging the jury as follows:

"In one word, then, to entitle the plaintiff to recover you must find that Rardon was himself guilty of negligence, and that that negligence contributed to the death."

12. That the court erred in charging the jury that "if you find that Rardon was employed by the defendant company to save the 'Enterprise,' and that he was a careful, prudent, and experienced man in his business, and that he exercised his best judgment in directing that the Enterprise be towed across the lake to Port Huron or Sarnia, and that his decision was prudent under all the circum-

stances, there is no negligence shown against the defendant which will entitle the plaintiff to recover."

13. Because the court refused to instruct the jury as requested by the defendant's counsel orally "that if the negligence of those on board the Enterprise caused or contributed to the loss there could be no recovery."

14. Because the court erred in charging the jury in respect to the measure of damages which plaintiff was entitled to recover.

15. Because the court — in charging the jury in this regard as follows:

"You may take into consideration his health, his age, his habits of industry and sobriety, his personal characteristics, his ability, mental and physical; capacity to render service, and probability of length of life; also the number and ages of his children.

16. Because the court erred in charging the jury as follows:

"In other words, what was his life worth, in dollars and cents, to these children—that is, the true nature of the damages is what, under all the circumstances of this case, considering their ages, their number, their sex, and the ability of their father to work and provide for them at the time of his death—what, under all the circumstances, was the value in dollars and cents of his life to them?"

17. Because the verdict of the jury was against the evidence in said case.

18. Because the verdict of the jury was against the weight of the evidence.

19. Because the verdict of the jury in respect to damages was not supported by the evidence.

28 20. Because the damages awarded by the jury were grossly excessive.

21. Because the court erred in directing a judgment in favor of the defendants other than the Continental Insurance Company.

MOORE & CANFIELD,
Def'ts' Att'ys.

29 *Motion for New Trial Argued and Submitted.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the second day of November, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Adm'r, &c.,
vs.
THE CONTINENTAL INSURANCE CO.

In this cause a motion by defendant for a new trial is argued by counsel for respective parties and submitted.

Order Granting New Trial.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the eighth day of February, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator of Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK *et al.*

In this cause a motion by the defendant The Continental Insurance Company for a new trial having been heretofore argued and submitted, now, after mature deliberation thereon, said motion is granted; and it is by the court now here ordered that the verdict of the jury heretofore entered herein in favor of the plaintiff and against the said defendant, The Continental Insurance Company, be, and the same is hereby, vacated and set aside, and that a new trial of said cause be had.

30 *Opinion on Granting New Trial.*

Circuit Court of the United States for the Eastern District of Michigan.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased, Plaintiff,
vs.
THE CONTINENTAL INSURANCE COMPANY.

On motion for a new trial.

The facts of this case were substantially as follows:

Plaintiff was the administrator of the estate of John Carbry, deceased, who at the time of his death was the engineer of a steam-pump on the barge Enterprise. On November 20, 1883, while upon a voyage from Sarnia to Lake Superior the Enterprise went ashore upon Green island, in the northern part of Lake Huron. While in that condition she was abandoned to her underwriters, of which defendant was one. These underwriters were represented by Crosby & Dimock, general insurance agents at Buffalo. Upon receiving notice of the loss Crosby & Dimock sent word to Capt. Rardon, their wrecking master, to organize an expedition and go to her relief. Rardon was what is called a marine inspector of four insurance companies represented by Crosby & Dimock. Among his other duties was that of rescuing wrecked vessels and getting them to port of safety. He carried a card, upon the back of which were the printed names of four insurance companies, known as the "Big Four," one of which was the Continental. The face of this card contained his

name and the words "marine inspector." Upon receiving these instructions he hired the tug Balize and certain steam-pumps and went to Green island. Upon arriving there he found the Enterprise had been lying 10 or 12 days upon the beach; got her off without great difficulty and started to take her to Detroit. John Carbry, the plaintiff's intestate, was the engineer of the steam-pump and in the immediate employ of the owner of the pump. About half way down the lake and off Pointe Aux Barques the Enterprise suddenly filled and sank with all on board.

The plaintiff claimed that Rardon was negligent in attempting to cross the lake at this season of the year without having made a more thorough examination of the vessel's condition before setting out. He recovered a verdict for $8,000, and the defendant moved for a new trial.

F. H. Canfield, for the motion; Don M. Dickinson, for plaintiff.

31 BROWN, *J.*:

The most important question in this case, and one which goes to the entire merits of the plaintiff's claim, arises upon the request of the defendant to charge that the limited liability act is a complete bar to the action. This act, which, so far as it is applicable to this case, is embodied in Rev. St. 4283, declares that "the liability of the owner of any vessel for any * * * act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." It is conceded in this case that the Enterprise became the property of the defendant by virtue of the abandonment, and that she became a total loss at the time of the death of Carbry. If the act applies to this case, it follows that the liability of the defendant was extinguished by the sinking of the vessel. There is no doubt that when the loss is total this fact may be pleaded, and no proceedings under the statute are necessary. The Scotland, 105 U. S., 24.

It was suggested upon the argument that the statute did not apply to a vessel in the condition of the Enterprise; but this objection is without force. She was still a vessel, though seriously injured by the stranding, and was in a condition to do damage to other property. It certainly cannot be the law that the owner loses the protection of the act the moment his vessel goes ashore, and that he must abandon her then at the peril of waiving this defense.

It is further insisted, however, that the act does not apply, as the negligence was not without the privity or knowledge of the owner. This position assumes that the knowledge and privity of Rardon was that of the insurance company—in other words, that he stood in the position of owner to this vessel. Upon the trial of this case I felt very grave doubt as to the soundness of this proposition, but decided to give plaintiff the benefit of this doubt, that the question might be more carefully considered upon motion for a new trial. None of the reported cases are decisive. Few of them throw any light upon the point. It was held in Walker *vs.* Transportation Co.,

3 Wal., 150, that the owners of the vessel were entitled to the benefit of the act, notwithstanding the negligence of their officers and crew—in other words, that the negligence of the owner must be personal negligence; but the question who is the person whose negligence shall deprive a corporation owner of the benefit of the act was not considered. This ruling was followed in the Whistler, 2 Sawy., 348, and in Chisholm *v.* Northern Transp. Co., 61 Barb., 363. Such is also the ruling of the English courts, Wilson *v.* Dickson, 2 Barn. & Ald., 2–13; the Warkworth, 9 Prob. Div., 20. In Lord *v.* Goodall, 4 Sawy., 292, it was said that when the owner is a corporation the privity or knowledge of the managing officers of the corporation must be regarded as the privity and knowledge of the corporation itself, citing Philadelphia, etc., R. Co. *v.* Quigley, 21 How., 202, and Hill Manuf'g Co. *v.* Providence, etc., S. S. Co., 113 Mass., 495, wherein it was said, in reference to this act, that "if the owners
32 are a corporation the president and directors are not merely the agents or servants, but the representatives, of the corporation, and the acts, intentions, and negligence of such officers are those of the corporation itself."

These appear to be the only cases in which the point is alluded to. If the question were whether Rardon was a fellow-servant of Carbry in such sense as to make the corporation responsible to the plaintiff for his negligence, we should have no hesitation in saying, upon the authority of Hough *v.* Railway Co., 100 U. S., 213, and Chicago, etc., R. Co. *v.* Ross, 112 U. S., 377; S. C. 5 Sup. Ct. Rep., 184, that he was not. But in this class of cases the question is not one of exemption, but of limitation of liability. The act does not contemplate that the owner shall be exempt from liability by reason of the negligence of his servants, but that his liability shall be limited to his interest in the vessel, unless his personal negligence shall have contributed to the loss. Rardon was not an officer of the corporation. He was not its general agent. He was the marine inspector or wrecking agent of four companies, of which the defendant was one. He was not even employed directly by the corporations, but by Crosby & Dimock, their general agents at Buffalo; and, so far as the record shows, neither the president nor the directors of these corporations had any knowledge of his appointment. His powers were no greater then those of the master of a vessel, whose authority to employ assistance when his ship is stranded is beyond dispute. If the owner had been an individual instead of a corporation it would have seemed clearer that Rardon did not stand in his place, but the law applicable to the case would be the same. We are entirely clear, in our opinion, that the case is within the act and that the judgment should be for the defendant.

The verdict will be set aside and a new trial granted.

33 *Judgment in Favor of Other Def'ts.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday,

the ninth day of February, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator of Estate of John Carbry, Deceased,
vs.
THE UNION INSURANCE COMPANY OF PHILADELPHIA, THE INSURANCE Company of the State of Pennsylvania, The Thames and Mersey Marine Insurance Company, Impleaded with The Continental Insurance Company of New York.

In this cause the j-ry by whom the issue was tried having heretofore, on the eighteenth day of December, 1884, rendered a verdict in favor of the defendants The Union Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and The Thames and Mersey Marine Insurance Company, now, on motion of Maynard & Swan, attorneys for said defendants, it is by the court now here considered that the said plaintiff take nothing by his suit against the said defendants and that the said defendants do go thereof without day; and it is further considered that the said defendants do recover against the said plaintiff their costs and charges by them about their defense in this behalf expended, to be taxed, and that said defendants have execution therefor.

Second Trial and Verdict.

THOMAS CRAIG, Administrator, &c., of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK.

The parties in this cause being in court by their respective attorneys ready for trial, thereupon comes a jury, namely, Oscar N. Baker, Peter Mulvaney, Charles G. Johnson, M. C. Hunt, John Buttars, Augustus A. Wiggin, George G. Matthews, George Rickel, John B. Clement, John S. Trites, W. H. Oades, and Thomas J. Griffin, good and lawful men, who, being duly impaneled, tried, and sworn well and truly to try the issue between the parties, sit together, and after hearing the evidence, under the instructions of the court, without leaving their seats, say upon their oath aforesaid that the said defendant is not guilty of the premises in the plaintiff's declaration in this cause laid to its charge in manner and form as the said plaintiff hath therein alleged.

34 *Orders Extending Time to Settle Bill of Exceptions.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday,

the third day of May, in the year one thousand eight hundred and eighty-six.

Present: The Honor-ble Henry B. Brown, district judge.

THOMAS CRAIG, Adm'r, &c.,
vs.
THE CONTINENTAL INSURANCE COM.

On motion of Mr. George S. Hosmer, of counsel for plaintiff, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended sixty days.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the fifteenth day of September, in the year one thousand eight hundred and eighty-six.

Present: The Honor-ble Henry B. Brown, district judge.

THOMAS CRAIG, Adm'r, &c.,
vs.
THE CONTINENTAL INS. CO.

In this cause, by consent, the time to settle a bill of exceptions is hereby extended ten days.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the twenty-fifth day of September, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Adm'r, &c.,
vs.
THE CONTINENTAL INS. CO.

On motion of Mr. F. H. Canfield, of counsel for defendant, the time to settle a bill of exceptions is hereby extended ten days.

35 *Orders Extending Time to Settle a Bill of Exceptions.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the fifth day of October, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Adm'r, &c.,
vs.
THE CONTINENTAL INS. CO.

It is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended until the further order of the court.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the twenty-ninth day of August, in the year one thousand eight hundred and eighty-seven.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Adm'r, &c.,
vs.
THE CONTINENTAL INS. CO.

The settlement of bill of exceptions is hereby postponed until Monday next.

36 *Final Judgment for Defendant.*

At a session of the circuit court of the United States for the eastern district of Michigan contin-ed and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the fifth day of September, in the year one thousand eight hundred and eighty-seven.

Present: The Honorable Henry B. Brown, district judge.

THOMAS CRAIG, Administrator of Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY.

The jury by whom the issue in this cause was tried having rendered a verdict therein in favor of the defendant, The Continental Insurance Company, now, on motion of Moore & Canfield, attorneys for said defendant, it is by the court now here considered that the said plaintiff take nothing by his suit, and that the said defendant do go thereof without day; and it is further considered that the said defendant do recover against the said plaintiff its costs and *cgarhes* by it about its defense in this behalf expended, to be taxed, and that said defendant have execution therefor.

37 *Bill of Exceptions.*

The Circuit Court of the United States for the Eastern District of Michigan.

THOMAS CRAIG, Administrator, &c.,
vs.
THE CONTINENTAL INSURANCE COMPANY.

This cause came on to be heard before Honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan, sitting as circuit judge, and a jury duly impannelled in said cause, on the 2nd day of March, A. D. 1886, and thereupon, to maintain the issue upon his part, called Anna Carbry and divers other witnesses, who were duly sworn, and gave evidence as follows:

38 ANNA CARBRY sworn for plaintiff:

Examined by Mr. DICKINSON:

A. I live in Detroit. I was born here. My father was John Carbry, who was lost on the Enterprise. His age at the time of his death was 47 years. The family he left consisted of three girls and one married daughter. The names of the unmarried daughters are Anna Carbry, Sarah and Louise Carbry. The youngest is 15, the next 17, and the next is 19 years of age. My mother is not living. She died last October. Mr. Carbry is my brother, who was drowned at the same time my father was, and was a strong healthy man.

EBER WARD sworn on behalf of plaintiff:

A. The greatest part of my life I have been engaged in boating. For the last six years I have been in the insurance business. I have been engaged in business connected with the Great Lakes all my life.

Q. In your marine insurance did you in 1883 know anything of a concern or combination in insurance companies known as "The Big Four?"

A. I did.

Q. What is the Big Four?

A. They were four companies working under one general management, consisting of the Continental, the Thames & Mersey, the Union, and Pennsylvania. I don't know that they were combined; I don't remember. They were what is generally known on the Great Lakes as the "Big Four." I took risks for the Big Four in 1883; did an insurance for them in the way of taking risks. I was the general agent for one of the companies and was permitted to do business for the general agents for the four. I could insure
39 hulls. I was taking hull risks. If I took $5,000.00 or $10,000.00 or $40,000.00 I generally forwarded the application to them, and they distributed it in such companies as they chose.

Q. Did you in taking risks make the distribution of the risk among the four?

A. Generally, unless the insured expressed some preference for one single company, and then we selected a company out of this four. That was the method. During the year 1883 they had a large business and large losses. They had more than one marine inspector for the Big Four. The man who did the business with me here was Captain Reardon. Sometimes we went to headquarters to consult about marine inspection. If it was here, we consulted Captain very often.

Q. Now, I suppose all companies doing a marine business have one of their officers or agents called a marine inspector. What is called a marine inspector?

A. I don't know that. They would have some one in their employ, certainly, to act as such. The duties of a marine inspector are to examine the condition of vessels, for one thing, in case of wrecks. They are notified as soon as possible and proceed to the wreck, and usually take charge of the wreck. That embraces not only the inspection of the wreck before taking it, but attending to wrecks.

Cross-examination:

I don't know with whom Capt. Reardon had his bargain. I don't know who employed him. I know he was employed by these people. I don't know who employed him. I never knew that. Of course, I could not say who hired him. I cannot state that the Pennsylvania or the Continental or the Union or Thames & Mersey employed him. I am an insurance agent for the purpose of soliciting risks here, at this port. I was State attorney of the Thames & Mersey for the purpose of receiving service of process, the same as any agent. I done business the same as any authorized local agent would for them.

Q. What did you mean, in answer to Mr. Dickinson, that you, as I understood the question, were called upon to consult with the inspector—what did you mean by that?

A. Why, there might be a vessel ashore, and we would telegraph the owners—I mean to the general agent, who was the general agent of the companies themselves. If they sent somebody to me, I would consult with them; or if they asked me to do anything—to get a tug or anything like that—I would do it. If we had no instructions from them we took the responsibility ourselves, without getting any instructions. I took the responsibily on my own shoulders. These marine inspectors are employed for the purpose of examining vessels to see whether they are proper subjects of risks, and that is the extent of the duties of the marine inspector. He is generally sent on wrecking expeditions, aside from that. All that I know are.

Q. But as inspector he does not go?

A. I do not know, but there might be a nice distinction. Capt. Nicholson, when I was in the Fire and Marine, was used in both capacities a great many times. I have seen him.

Q. Something was said about this Big Four acting together. Did they act together any more than any insurance companies who happened to have risks on the same property?

A. They were represented in one office in Buffalo. I think Dimmick & Crosby were the agents in Buffalo for the four companies. Our policies were sent in that way from the four companies that we took from. Dimmick was the original agent for the Continental, but when they came together I think Dimmik & Crosby acted for
41 them. I represented several companies in Detroit. They were independent one of the other; so were these four companies. I knew nothing myself of the Big Four having insurance on the Enterprise, that was lost, until after the loss. I think I talked with Capt. Reardon afterwards a little about it. I did not take that insurance myself; it was not taken from this office.

H. C. MUNSON, sworn for the plaintiff:

A. My business is insurance, both fire and marine. I have done some marine business for a great many years. I was engaged in that business in 1883. I done business with Crosby & Dimmick, who had four companies they called the Big Four, I believe; I have heard so. I could not say as to the exact relation I stood with those companies. I was regularly appointed as the agent of the Insurance Company of the State of Pennsylvania. I did a general marine business for the Thames and Mersey and the Union, but under open policies. I know who composed the Big Four. As I understand it, they were the Continental, the Thames & Mersey, the Insurance Company of the State of Pennsylvania, and the Union of Philadelphia. In my business in 1883 I understood the Big Four had a marine inspector, Capt. Reardon.

JOSEPH NICHOLSON, sworn on behalf of the plaintiff:

I have been engaged in sailing on the Great Lakes all my life, except when I have been in charge of the house of correction, and have been engaged in the marine insurance business somewhat. I have been owner of vessels and boats on the lakes and have frequently had to do with insurance in that line of business. I was in
42 the Detroit Fire & Marine Ins. Co. I was what is called a marine inspector of the Detroit Fire & Marine. My duty as marine inspector was to look over the risks—the vessels—and attend to them if they met with any disasters, and such business that was in the marine department; inspect vessels before the risk was taken, and see to them if they got into trouble. In case of a wreck the marine inspector usually would go and take charge of the wreck for the company. In case a vessel should go ashore upon the rocks, if the marine ins. Co. had a risk upon her it would usually fall within the duty of the marine inspector to look after the wreck—to see to it. It usually falls on those who have charge of it for the ins. Co. The inspector of the insurance company having a risk on the vessel usually looks after it—the marine inspector.

Cross-examination:

When this marine inspector goes to look after a wreck he goes because the company has instructed him to go. If there are any instructions he must obey the company's instructions. I hardly think he has any authority of his own after being instructed by the company to act.

JOSEPH NICHOLSON recalled.

Examined by Mr. DICKINSON:

I have been engaged in navigating the Great Lakes as sailor and master over twenty years; engaged in both sail and steam navigation.

It is conceded that the witness is an expert.

I have had some experience in wrecking.

Q. I will ask you this question: whether you would take a ship that had been upon the rocks for ten days or two weeks, subject to the wind and waves of Lake Huron, out into the open lake, in the month of December, without ascertaining positively the condition of her bottom?

43 A. I would ascertain as nearly as I could what her positive condition was. I would probably have no means of ascertaining positively without getting her into dry dock. I would do the next best thing; use my judgment, taking into consideration all the facts in the case as they would present themselves and meet them in such a way as I thought necessary before I went out with her; take every precaution I could.

Q. Suppose she was lying in a safe harbor in the month of December, as late as the 10th of December, lying in a good harbor, having pounded upon the rocks for ten days or two weeks before you had no diver to ascertain the condition of her bottom, would you take her out into the open lake in that month without ascertaining the condition of her bottom?

A. I should certainly not, unless I was pretty sure I was warranted in doing it from such examination as I could make. The first service of the hold, the sheathing before you reach the bottom of the hull, is called the ceiling. There are limber boards by the side of the keelson put down so they can be taken up again.

Q. Would you say it was good seamanship to take a ship out into the open lake without shoring down the limber boards?

A. I think it was a little careless unless they were held down by some other process, unless they were held down by something else.

Q. What ways are there of ascertaining the condition of a ship's bottom in case she has been upon the rocks?

A. When afloat?

Q. Yes; w-en afloaft, after having been pumped out so she would float.

A. If there was no diver to ascertain accurately I should judge by the volume of the leak, the shape of the vessel, and many

44 other little details that would present themselves that would be very difficult to explain. A great many little questions

would come in that would be difficult to explain; things that would control your judgment—that is, a great many questions would arise in getting at the condition of the vessel, a thing you can't say. You have got to judge by the circumstances surrounding it, the time she took in filling, how long it took to pump her out, about how fast the water was coming in.

Q. How could you ascertain that? Could you do that by boring through the sheathing to get the pressure of the water?

A. If you were satisfied she was leaking and you wanted to locate it you could get at it by seeing whether it was forward or abaft a certain place. You could locate it in that way. You might go beyond it and then come back and find it where it was, and in that way adopt some means of stopping it. The boring process might be practical in some place, and probably would be a very good idea in some cases.

Q. The ordinary way of ascertaining the condition of her bottom is by putting her into a dry dock or by a diver, isn't it?

A. Yes, sir; if you have them.

Q. The diving apparatus is an ordinary incident now, is it not, of wrecking expeditions?

A. Yes, sir; it is used a good many times.

Q. What is the usual apparatus for wrecking expeditions where vessels are upon the rocks?

A. Steam-pumps. Sometimes, if you get information that will warrant you in taking other things, you might take a diver. You might take jack-screws and many other appliances, but the ordinary thing is to take steam-pumps. That is about the usual practice. A diving apparatus is not always taken. That depends upon the information you get with regard to the vessel. It is a good thing to have.

Q. I will ask you this question: Supposing the month of December; that is considered the most inclement season upon the lakes, isn't it?

A. Yes, sir; the most stormy season upon the lakes.

Q. The month is December. You are advised a vessel has been upon the rocks, subject to the storms, winds, and waves, and you go to her. You are advised of her condition and you go to her. Would you, without the use of a diver to ascertain the condition of her bottom, bearing in mind that she has been upon the rocks and pounded, take her out in the open lake without having her bottom examined by a diver, she being then in good harbor?

A. I think I have done so once in my lifetime when she was in good harbor, and that at a time when diving apparatus was commonly used in wrecking expeditions, and taken her into the open lake.

Q. What precaution did you take to ascertain her condition before taking her out? Did you take any?

A. Yes, sir. I judged by the time the vessel took to fill. I judged of the volume of the water by the time it took to pump it out, and after we got it pumped out I judged the amount of the leak by the time it took to pump it out, and I then took other precautions, such

as putting up other pumps, and, if I could find the leak, stopping it; but invariably took the precaution to put other pumps in position, in case the leak should break out which I did not anticipate, but I would be ready for it. I would put the tug the usual length of tow-line from the wreck, and would arrange a code of signals between them by whistles, if they needed any assistance. I have always done this. I think that is the usual course.

46 Q. Suppose that the vessel is in a condition, when pumped out by the use of two or three pumps, so that she floats in a quiet harbor, with canvas over her bottom, but she floats only by the use of the steam-pump to keep her free from water, would you take that ship out into the lake?

A. Well, I could only simply state, as I did before, that the surrounding circumstances would govern my judgment entirely. There are very few vessels that have to be pumped out, but have to have a steam-pump to go through, and the watching of the steam-pump is just as much of a necessity as anything else. If the water once gets the start of you the deeper the vessel goes and the faster she will leak. It is very important the pump should be watched and the water kept to its very lowest possible stage all the time. I should use all the precaution that I deemed necessary.

Q. Would you take a vessel out without an attempt to get at the leaks and stop them?

A. If I had no means I would have to bring her out some time.

Q. I would like to know why you would have to bring a vessel out of a safe harbor where she might lie all winter?

A. Have to come through the lake some time.

Q. Would you like to come through the lake in the winter?

A. Well, there is a great deal on that to judge by the person having charge. A person who is not on the spot has a great deal of difficulty in judging. The man who has charge of it, if he is a competent man and attends to his duties thoroughly, very seldom makes a mistake, and it is very difficult for me to state whether it was good or bad judgment. There are many surrounding circumstances arising in a case of that kind that are difficult to ex-

47 plain. As I said before, a man must use his judgment and take into consideration the circumstances and see if in his own judgment he is warranted in doing so. I don't know why he shouldn't do it. The circumstances of the season, the inclemency of the season, the cold weather, makes it more difficult and dangerous; no doubt about that at all; more liable to gales; more liable to circumstances you do not wish to meet. In a storm or seaway a vessel will leak more, and the very act of towing and passing through the water tends to make her leak more. She will probably leak more in going through the water than lying still.

Q. Suppose you knew that the bottom was so broken that it required the use of canvas passed under the vessel as a jacket, would you take that vessel out in Lake Huron in the month of December, with thirteen persons aboard of her?

A. I don't know just exactly what I would do under the circumstances. As I said before, I should judge myself; if I thought it

was proper I would do so. The jacket is a precautionary measure if it is properly put there.

Q. Let us see. Do you know whether it was properly put there?

A. I don't know it was. Properly putting it there consists in putting it over the leak, battening it with strips. I think towing ahead, if the water of the lake got inside of it, it would be of no use; the water would be very apt to get on the inside if it was not battened. The object of battening is to hold the canvas to the hull. If it was not battened the water passes under the canvas in some parts of the vessel.

Q. Do you know the tug Balize?

A. Yes, sir.

Q. What would you say of the use of canvas upon a barge in tow of the Balize which was put upon the barge without batten-
48 ing and towing her across Lake Huron at the rate of eight or nine miles an hour?

A. The canvas would be very apt to get out of place.

Q. Would you, in any event, start out without examining the hull or bottom?

A. I should certainly know all the circumstances.

Q. Would you think it necessary to make any examination?

A. I would make all I could make; I should think it necessary to make an examination.

Q. Would you start out without having the limber boards shored down or fastened in some way?

A. I would not if they were not fastened down. I would not start out without it.

Q. Would you permit the barge or vessel in tow under which you had canvas, or upon which it was necessary to have canvas, after she had pounded upon the rocks, start out with thirteen people aboard without providing a suitable boat with oars upon that barge?

A. I hardly know; I don't think I would.

Q. Would you start out with the tug in front with the tow-line without arranging a code of signals between the barge and the tug?

A. I have just answered. I would make all my arrangements for signals; I would make a special arrangement; I have always done so.

Q. Will you please state what the position of the wrecking master should be in the case of towing a wreck across the open lake—the proper position?

A. Well, that depends upon many things. You would be guided a good deal by the circumstances.

Q. But suppose the master of the vessel was absent and the mate was a stranger to you, and she was in the condition I
49 have stated in my previous question, would you leave the control of the ship to the stranger mate in the condition that she was?

A. The fact of his being a stranger probably would not govern me and it would depend somewhat. He has a duty to perform as well as I have. If I thought he was a man that didn't know any-

thing, or a judge of his duty, I would attend to it myself. I would satisfy myself first. I don't think I would start out without telling him I would go.

Cross-examination:

The prudence required in any particular case would depend upon the circumstances of that case very largely. A competent and experienced man who was at the wreck and saw the condition of the vessel and knew all the circumstances would be better able to judge than anybody else of what was prudent and what was imprudent. I have known Capt. Rardon a long while. He is a man of large experience in this business. He has the reputation of being a good, thorough sailor and wrecking master.

Q. Suppose the vessel you were going to has been standing upon a smooth rock; when you get there the pumps are put aboard and she is pumped out and the tug then takes her into deep water and she is kept clear by the use of one pump, say, from Thursday night until Sunday morning, lying in six or eight fathoms of water, no difficulty being experienced in one pump keeping her free, what would you say, as far as that indication goes, as to it being imprudent to go across the lake?

A. I would consider it imprudent to go with that one pump.

Q. Yes; but I say suppose you have other pumps aboard and one pump was all that was necessary to keep her free that length of time, would you say she was leaking so badly it wouldn't be safe to take her across the lake with two pumps?

50 A. No, sir; not unless there were some other circumstances.

Q. But so far as the extent of the leak was concerned?

A. You would have to judge of that from how long the pump was running and all those things.

Q. Suppose you start with that vessel; she has been kept free by the use of one pump from Thursday night till Sunday morning at four o'clock without any trouble; you start with her at 4 o'clock across the lake and one pump only is found necessary to keep her free until Sunday evening at 6 o'clock, would you suppose she was in such a leaky condition under those circumstances as to render it imprudent to go across the lake with her?

A. There is nothing so far to indicate any imprudence.

Q. That would not indicate a very bad leak?

A. Not so far; no, sir.

Q. Would you not say, under those circumstances, that if one pump was sufficient to keep her free for that length of time, from Thursday night till Sunday morning while lying astern the tug, and then from Sunday morning at four o'clock until Sunday evening at six o'clock while under way across the lake, would you not suppose, that so far as those indications go, it would be perfectly safe to take that vessel across the lake if you had two pumps aboard?

A. The facts, so far as you have stated them, would warrant it, in my judgment, that he was not at fault.

Q. You would not hesitate to go with her so far as those facts are concerned?

A. Not so far as you have stated them; no, sir.

Q. Now, in regard to the diver. If I understood your testimony it is substantially this: That sometimes divers are sent on expeditions and sometimes not?

51 A. I so stated.

Q. There is no rule about it, is there, whether a diver shall go or shall not go?

A. No more than I have stated. You take a diver if you think it is necessary from the information you get, if you can get one.

Q. Suppose you were acting as marine inspector and you were at a wreck on Chantry island over there near South Hampton, and while there you learn a vessel is ashore on Green island; you are there at work at Chantry island without any diver and this vessel was ashore there and needs assistance, do you think it would be imprudent or improper to go to her assistance without going for a diver anywhere?

A. I would not think it improper.

Q. As a matter of practice, according to the usual custom, are divers sent on wrecking expeditions ever except upon special orders?

A. I think not as a matter of practice. There are one or two tugs that carry divers, and aside from that I don't think they do unless they are called upon.

Q. Do you know where any divers could be procured? Suppose you are at Chantry island or at South Hampton, do you know where it would be possible to secure any divers in that vicinity?

A. I don't know of any nearer than here. It is not far from 200 miles, I guess, from here to South Hampton or Chantry island.

Q. You have testified that sometimes divers were sent, sometimes lighters, and most always steam-pumps?

A. Yes, sir.

Q. But lighters are sent twice as frequently as divers, are they not?

52 A. I don't know but they are.

Q. It is not customary to send divers unless there is an order for them?

A. Very much the same from the information you get from the wreck, and often it is a very meager telegram that you get that you go upon. All those questions are difficult to explain and arise with each case. I have been past Green island. It is a small island in the northeastern part of Lake Huron and uninhabited. There is no means about there of caring for a vessel, even after she is gotten off and got into a safe place near that island.

—. Suppose she is taken off the rocks and taken into the lea of the island in six or eight fathoms of water, how could she winter there?

A. In that depth of water when she is leaking so it takes two pumps to free her and one pump to keep her freed, I would not consider it safe to winter there; would not consider it a safe harbor for her there in six or eight fathoms of water. There are no docks there. I would either have to let her sink there or take her into shoal water. The first thing after taking her off would be to find a dry dock where I could get her repaired, and the most convenient

dock would be here in these rivers. I don't know the nature of the harbor inside. I have never been in. There are many places you could take a vessel and let her go to the bottom and leave her in quiet, peaceable water. Whether that place exists at Green island I don't know. It might be a good harbor for a harbor of refuge. I have never been inside. If she could get the right condition of bottom and the depth of water under the island, where you could get her onto a smooth bottom and not in too deep water, it is possible it
53 might be. The distance across, I should judge, without looking at the scale on the chart, was probably a mile to the mainland; perhaps not so far—that is, the north and south direction would be the greatest sweep it would have that would blow over the island. There might be a spot there, but if you had a vessel in that condition you must sink her, but there would be no safety in six or eight fathoms of water. From the conditions as represented to me I would prefer not to take her away.

Q. What are the usual signals to be given from the wreck to the tug towing her?

A. The sound of the whistle. If you have a whistle on the steam-pump, blow it two or three times if you want something. That is well understood, I think.

Q. Being well understood, and it being known that one of the pumps has a whistle, would you think it necessary to make any particular arrangement for sounding those whistles or giving any particular directions in regard to it, there being a good, experienced pump engineer aboard?

A. My experience with pump engineers is that they don't want much to make them howl for help. They always ask for it when they need it and often before. I think it would be well to arrange, though. Still, they understand what signals to give as well as anybody. In regard to the limber boards, anything that will keep those limber boards down, whether by piling iron or other articles upon them, is sufficient. If they are held down, it makes no difference how they are held down.

On redirect examination witness testified:

If they are loaded with iron, they will stay down. It don't take but a very little piece of iron to hold them down. There is
54 a very small space; probably ten or ten or twelve inches wide. They run about that.

Q. Isn't it the proper way to shore them down by bracing against the upper deck?

A. If there is any virtue in that, it would be a necessary precaution. Where a ship has been floating with one pump going for, say, from Thursday to Sunday, it would not be imprudent to take her out into the open lake.

Q. Would it be a test that she would float in a storm or in a sea if she floated by keeping one pump going in a quiet harbor?

A. That is one test you can make.

Q. You can answer the question.

A. It would be one test. I have already said that I knew the tug Balize.

Q. At what rate of speed do you think she would tow a barge that was light—at what average speed?

COURT: Do you know the Enterprise?

A. I know something of her. I don't remember of seeing her. I think she is a vessel of about 180 feet keel. I don't know her draft of water. It would be guessing how fast she would tow her. I could not say how deep she was in the water, and her condition of steering, but I should say she would tow her, under the circumstances described to me, probably six or seven miles an hour. I should think that would be her speed.

Q. Do you say that the fact that one pump kept a vessel free in a quiet harbor, with a canvas jacket around her, without being fastened by boards—being battened—would be any test as to the safety of towing that vessel out into an open lake in a chop sea sufficient to make her roll, towed by a tug at the rate of six or seven miles an hour?

55

A. Yes, sir.

Q. Satisfactory to teach you it would be prudent?

A. Yes, sir.

Q. Now, you say there was no dry dock, so far as you know, nearer than Detroit for the Enterprise, or the rivers—the Detroit and St. Clair rivers. Is that so?

A. I believe there is one at Bay City; at least they have a way of hauling them out of Bay City.

Q. Would the question of whether there was a dry dock within ten or two hundred miles in the month of December enter into your calculations as to whether it was prudent to take a vessel out with the crew on board?

A. The question whether a dry dock was within ten or two hundred miles would warp my judgment or not under the circumstances described is the question. I say it would. Now, sir, I may find a vessel that it would be amply prudent to go ten miles with, and it might not be prudent for me to undertake to go two hundred miles.

Q. In answer to Mr. Canfield you stated that, taking a place like Green island, there were no means for caring for a vessel. Will you tell the jury what means there are for caring for a vessel during the winter or what you refer to as the means for caring for a vessel?

A. I think Mr. Canfield's question was with reference to repairing a vessel.

Q. No; it was caring for a vessel. What means do you refer to as caring for a vessel?

A. The mere letting her remain there. I didn't understand the question in that way. I understood his question to be to repair the vessel and fix her. If the question was put in that shape I certainly did not understand it. I don't know whether the vessel could be cared for; I know she couldn't.

56

Q. Did she need a dry dock to stay in safety there?

A. No, sir; she didn't.

Q. You were asked the question by Mr. Canfield as to whether

she would lie in safety in six fathoms or seven fathoms of water—that did not have a less depth of water than six or seven fathoms—and you answered she could not. Now, did you ever know a harbor that contained six or seven fathoms of water—that did not have a less depth of water than six or seven fathoms?

A. No; I don't know as I have.

Q. Then it would be perfectly easy, would it not, to move a vessel if she was lying in six or seven fathoms of water?

A. Yes; but he didn't ask me about a shoaler place; he asked me in six or seven fathoms of water, and I told him in that depth, with a steam-pump, it would not be.

Q. Suppose the vessel was lying there in a safe harbor—I mean safe from the wind, in six or seven fathoms, and from the sea—and it was contemplated to leave her in the harbor in the winter, what would you do? Would you move her into a shoaler place?

A. I most decidedly would if I could find one.

Q. If she was moved into a shoaler place and scuttled she would lie safely, would she not?

A. If she had a safe place to lie she would; yes, sir.

Q. What are the uses of dry docks?

A. Repairing vessels; that is all.

Q. You have no doubt that the vessel would have lain safely all winter in the harbor if it was sheltered from the wind?

A. I have no doubt that a place probably could have been found to make her safe if they so desired. It is a harbor.
57 I don't know anything about the inside of it. I don't mean to be understood that there — six or seven fathoms of water all over the harbor.

Recross:

Q. In your direct examination by Mr. Dickinson yesterday afternoon you were asked about the jacketing of a vessel. What is the usual way of jacketing?

A. Drawing a canvass around under the botton, hanging it up by ropes around each side fastened to hold it in place, nailing some bat-ens across it to keep the water from inside of it, the forward edge particularly, so the water will not get inside and keep the canvas away from the crack that it was put there to stop. Sometimes when they cannot get bat-ens they draw ropes under; not much use.

Q. Suppose there was a double canvas, No. 2, and No. 6 bat-ens, and then ropes drawn around the outside of those bat-ens and made fast. Will you state whether that is a proper way?

A. If the canvas was battened on both edges and ropes brought from the middle of the canvas it would be a very good way. If the battens are nailed only two feet apart I should say it was a pretty good job if the lines were two feet apart. The lines would be effective where they would hold against the side of a vessel. Probably from about here, a little bit on the keel of a vessel, there would be a space where they would not be so effective, but all around the side the line would answer. Where a vessel is lying in the water it

would not be possible to batten next to the keel, not without a diver. You could batten down some distance; depends on just how deep the vessel was. You probably could batten two feet under water.

Q. With jackets put on so as to stop the leak or battens
58 put on stopping the leak so that one pump keeps the vessel free while she lies there in deep water from Thursday night to Sunday morning and from Sunday morning until Sunday evening at six o'clock what would you say as to its being so dangerous or there being anything to make it dangerous to attempt to take that vessel to a port of repairs?

Objected to unless it includes the element of the season of the year.

Q. The season of the year I am talking about. I direct all my questions to that.

A. I can give you the answer I gave you on that before: That I should judge entirely by surrounding circumstances, the volume of the leak, how hard it took the pump to work in steady work, whether in full capacity or not, just what I would accomplish in putting the canvas on to stop the leak, and many other things — numerous to indicate would affect my judgment.

Q. Suppose one pump keeps her free and there was another pump to use in case of an emergency, would you think the leak so bad as to make it unsafe to bring that vessel to a port of repairs?

A. I have already answered I would not.

On redirect examination witness testified:

I do not call the ropes around the canvas battens.

Q. Would you consider it prudent to go out with a ship at that season of the year with a vessel requiring canvas under her bottom without having it battened with strips of wood?

A. Well, I should not think it very imprudent if I took the best means.

Q. Will you state whether it would be safe to go out without the canvas?

59 A. I should not consider it prudent under the circumstances described by him. If I could not get it battened I would do the next best thing. It would be safer with battenings.

Q. If you could do the best thing—if you could batten it—would it be safe to go out without doing so?

A. Under the circumstances presented to me I think it would be.

Q. You think it would be even if you could batten it?

A. Yes, sir; I think so.

CHARLES McKENZIE sworn on behalf of plaintiff.

Examined by Mr. DICKINSON:

My business is that of hardware merchant. I live at Sarnia, Ont., and lived there in 1883. I know the circumstance of the loss of the steam-barge Enterprise in the fall of 1883. I had an insurance on

goods that I shipped on her, the Enterprise. I also had policies upon her hull. There was a private policy upon her hull which was paid, and the policy was surrendered to Dimock, of Buffalo, agent of the Continental. I have the fire policy in that company with me.

Witness produces policy, which is offered in evidence and marked Exhibit B.

The other was a policy upon the hull for $5,000.00. It was paid early in May, 1884. I can't say the name of the company the policy of which I surrendered.

Cross-examination:

The vessel was lost in the fall, and immediately afterwards one policy came into my possession. She was a total loss, off Port Austin, in Lake Huron.

MELISSA PETERS sworn on behalf of the plaintiff:

60 I live in Sarnia, and was on the Enterprise in 1883, cooking. I was on board the Enterprise when she went ashore on Green island and went ashore with the crew. I was present at a conversation between the last witness, Lyons, and Capt. Rardon. I heard it in the shanty where I was stopping. I could not say how long before the boat started out that was said in the shanty. I don't know whether it was the day before Sunday morning or the day before that. I heard Capt. Lyons say to Capt. Rardon, Are you going to take the boat down? Rardon says, I don't know. Lyons said, The boat was in a bad state, and he would stay and keep ship all winter. Rardon said if he took the boat down he would be very cautious and he would only tow day-times. That was what he said in my presence. I heard Capt. Lyons tell Capt. Rardon how the boat had been pounding upon the rocks there. They all heard that as well as I did. Of course they all heard it. That was what I heard Capt. Lyon tell Capt. Rardon. He said the boat was pounding so she was not fit to go out. He said he thought her bottom was broke. She twisted around and worked so in the sea that he didn't think she was fit to go down. After I went ashore from the Enterprise she was in plain sight. She went backwards and forwards, working upon the rocks there. The smoke-stack and spar went past each other like that. When the sea went down she went around like that (illustrating); kind of twisted around as if she was bent againt the rocks. All the boys saw that. If they were living today they could tell you the same. I saw this opening and weaving all the time from where the camps were. I didn't go in the shanty at all. After the sea went down I went there and cooked for the men. I stayed, before I went into the shanty, in the camp—where the boys used to camp. I talked with Capt. Rardon about
61 coming down. He said they would have to have a cook. I said I would not come on the boat again. I would stay on Green island and freeze to death first. I said she would never see Port Huron. He said, What makes you think so? Well, I said,

I know she won't. Says I, It is just by chance. He says, Yes; just by chance. I said I would not come down on the boat, and Capt. Rardon said he guessed he could make room for me on the tug. I was up when the Enterprise went down. I did not hear anything of the whistle from the Balize. I was in bed, but not asleep—below in the dining-room.

Cross-examination:

I say it was evident to everybody that the Enterprise was in bad shape. Anybody could see that. Anybody who had ever been on the boat could see it was unsafe. I knew she would never see Port Huron. Mr. Rardon, who sits there, knows I told him so. I saw the Enterprise after she was gotten off the rocks. It was just night when I saw her, when I was going over to the tug. I saw her all time while she lay on the rocks until I went to the fishing shanty. I did not see the tug Balize when she came there. I never saw her until I went on her. I think it was Wednesday evening when I went to the shanty. The Enterprise was gotten off the next week. I was over to the camp, and saw the Enterprise every day. I did not see her when she was taken over to the lee of the island. I did not see her while they were pumping her out with the steam-pumps. I was on the other side of the island. She was twisted around in bad shape. She never got straightened around again that I know of. When I went to get onto the tug I didn't take much notice of her. I don't think I was up on deck more than once; anyway more than twice—once in the forenoon
62 and once in the afternoon.

Captain PETER LYON sworn for the plaintiff.

Examined by Mr. DICKINSON:

I live in Sarnia. I am a sailor and was in 1883. I was on the barge Enterprise as mate. She was a good little barge. She was carrying general merchandise up to Lake Superior. I was not upon her all the season. I was upon her in December and November, 1883, and at the time of the wreck. We was intending to come down to Sarnia. We was going up on the north shore of Lake Superior from Sarnia with a load, a full load, of merchandise. Part of her load was there at Sarnia and part at other ports. We were going up. It was pretty foggy. We made Green island; when we made it we were pretty close to Fox island. We were rather too close under the south side of it, and we hauled around. When the captain shaped his course for Missauga strait she fetched up on Green island. Green island is about ten miles this side of Missauga straits. The straits are between Coburn island and the Big Manitoulin, the extreme northern part of Lake Huron.

Q. How did she go on? You say she went onto Green island.

A. Well, at 6 o'clock the captain went to tea and I took charge. I thought I could see something dark ahead of me through the fog, so I jumped and caught hold of the bells and stopped her. After that I started down on the port side to go and call the captain, and

I went down to the dining-room, and during that time he was coming out on the other side through his room, and I just met him forward of the pilot-house. I says to him: Captain, there is land ahead.

COURT: The details of getting ashore, it does not seem to me, is of any consequence in this suit.

63 She run upon the rocks full head. Green island is not inhabited. I could not say how large it is; there might be a thousand acres in it; I do not know. She went right up until she fetched up against a reef. She went into eight feet of water. The sea was right in her stern. We worked the engine all night, backing. She went—suppose this was eight feet of water there and seven feet there—she went until she struck the stem like that. She grounded on the rocks; smooth rocks. I did not notice any bowlders. She stayed there—I do not know the number of days—about two weeks. She went ashore in the evening, a little after six, and the next morning about 9 o'clock the sea died away until we could launch the boat. Then the captain took four of the men and went away to Coburn island. He said he was going after a little barge. After we got the tug Jennie and she lightened her up we hove around in that position alongside of the reef. Our anchor broke its hold and the little Jennie had a line from us to give us a pull, and the boat did not suit the captain and he did not pull her at all. She swung around on this reef again. There was a gale of wind came and she laid in that position across the reef, with the reef under her centre. We had to go ashore one night about two o'clock in the morning. We had hard work to get ashore. There was a very heavy gale of wind came up and smashed everything up. The sea came in there against the ship, clean over her. She rolled heavy. They did not work the machinery afterwards. I think it was about two weeks that she remained there. We had two or three storms in the meantime. She was straining and pounding on the rocks all that time. Captain Reardon came there with the tug Balize, and he whistled outside and we took the yawl-boat and pulled out to him. He asked me several questions. He asked me the state the boat was in, and I told him. He went away
64 for a lighter. He came back with a lighter and returned then to take the stuff out of her and put a steam-pump aboard of her to pump her out. So one pump would not pump her out and he put in a second one, and that pulled her off. During the time we laid there, every time I could get ashore with freight I did so. I worked right along and took everything; saved everything I could.

At the time Captain Reardon came the crew was all there but the captain.

Who took charge of the lightering and the pump and so on?

Captain Reardon.

He seemed to have all to say about the charge of the wreck. Every one obeyed his orders.

John Carby, the engineer at the pumps, came there on the Bazile with Captain Reardon.

He was the rest of them to put the pumps aboard, and fitted them up, and worked one of them.

These pumps were brought by the Bazile.

After putting the second pump on, and she was lightered off, the tug pulled her off and towed her right around to this side of the island, the north side, into a harbor there.

There was a good harbor there. It is quite a large, clear harbor, a fine harbor. A ship in there would be sheltered from any storm. After towing her around there, the first evening we got around there, Captain Reardon said to me to put a tarpaulin on her, to put one under her. He says, Do the best you can. When I first went aboard of the tug—when we pulled out to him, when he first came there, I went aboard of the tug Balize, and he asked me the state of the boat, what state she was in, and I told him as near as I could. I told him how she worked in the
65 sea, and he said he would go and get a lighter. So he went off and got a lighter. Then there was nothing more said between us until he came into the shanty where we were stopping. I told him how she worked in the sea, and how her foremast and smokestack would pass each other, and that I did not think she was fit to go down the lake. He said he would see. That was after we got in the harbor. One pump had to work all the time, even in the harbor. Carby was working the pump. I cannot tell you what day of the week this was that I had the talk. I did not keep any date at all. I had another talk with Reardon as to the condition of the ship, and about her remaining there. This was in the shanty. I said to him in the shanty—I told him that the boat was in bad shape, and that I would volunteer to stay there and keep ship all winter if he liked. He says, I will see. So after that I worked on just as I was carrying those goods onto the island, so they could be put aboard again. I went aboard the Bazile Saturday night, and Captain Reardon said—says I to him, We have not got any wood, nor our boat is not in shape to be used. I said, You had better get the Bazile's boat for us. Our oars being lost at that time, the boat was gambed up—the yawl-boat. Her planks were sprung from over her stem clean up right and down. Captain Reardon saw it to-. I told him the boat we had—that we had no boat fit to go, and there were no oars. Captain Reardon said to me, says he, Well, you can go ashore to-morrow and get what wood you want, and we will get everything fixed in good shape. Of course, with that I took it for granted that he was going to do so. I went aboard and told some of the boys on the steam-pumps the same thing he told me. Everything went all right that night with the one pump going; kept her free until, I think, somewhere about 4 o'clock in the morning Sunday
66 morning they started off with us. When they whistled they were off quite a little piece from us. We had no wood aboard to make a fire. The engines were not running—they could not run—and all this time that she was lying in the harbor it took one pump

all the time to keep her afloat. I do not know in what direction we went when we started out. I did not watch our compass. We could not go any way except out into the lake. How far from the harbor of Detour we were I do not know. There were other harbors around near there. We passed a good many on the Michigan shore along. We could have went into Presque Isle. I cannot think of the names now—Alpena harbor. There was nothing done before we started as to providing us with a yawl-boat nor any indications given us or any statement made to us as to what signals would be given. The next morning, while we was towing out, I went to the engineer and asked the question. He did not know of any—whether there was any whistle on the steam-pump. We got along until 6 o'clock Sunday evening. At 6 o'clock the boat started leaking afresh. We had to put the second pump to work. The instant I discovered it we blowed the whistle, and we blowed quite a while, and we whistled and blowed and we got no reply whatever. They paid no attention to us whatever. I found that the water was not making any more than the two pumps could keep free, and consequently we did not whistle any more. We worked the one pump all the time, and the other one we pumped about three or four minutes—two or three minutes—and them she would lay still about that length of time. She worked that way until she went down. Was up all that night. The four men that belonged to the steam-pumps were up all the time, right at their posts, and I was up. John Carbry was up. We discovered that the water was gaining about 2 o'clock. We blowed the whistle and gave the alarm.
67 I hollered to one of the deck hands. I hollered to him to warn the boys that she was sinking. About 2 o'clock she went down. It did not appear to be—not to me—to be over two or three minutes after we discovered the water was gaining, and Carbry, about the time she went down—just a few minutes before she went down—was standing by his pump. She was
68 towing when she went down. From the time we started from the harbor there was no communication from the tug to see how we were getting along. Captain Reardon went on the tug Bazile. He did not give any reason to me for being there. There were 13 people on the Enterprise that night. She was taking us up to Sarnia. The freight that was taken off was put back on the Enterprise—on the upper deck. It was put in the hold. The timber boards were not fastened down before we started out. There was not, to my knowledge, any means taken by Captain Reardon to examine the bottom of that vessel. I was ashore getting these goods off. I do not know of his examining the bottom. I had several conversations with him about her having pounded on the bottom; do not know of his making any examination by boring through the ceiling. It was not bad *whether* the Sunday night when she went down. It was quite of a chunk of a sea on. We had nearly crossed Saginaw bay. There was nothing done to *the* batten the canvas that was put around. I could not say how long I was in the water there. She went down at 2 o'clock. Some of the rest could tell better than I could. I did not know anything when I

was picked up. They said I was —; it was two or three hours before I knew anything. I knew that Carbry was drowned. I do not know when he died. He was a corpse when I came to Sarnia. Captain Peter Williams was master of the Enterprise. I was the mate and had been about a month and a half. She was a barge, a steam-barge, carrying lumber from Georgia bay, and she was sold to C. R. McLennan, of Lake Superior, for carrying general cargoes. She was loaded with a cargo of general merchandize, bound from Sarnia to Lake Superior ports, at the time of this disaster. We expected to winter at Prince Ar-
69 thur's Landing. That is the northern shore of Lake Superior. Captain Williams stayed there for four days. When he went away he did not say a wors to me. As mate, I assured charge of matters them when he went away. I was in command of the steam-barge when we started. When we got her off and started for Sarnia the crew consisted of 13 men—not my crew alone. There was four men that belonged to the steam-pumps. I was there on watch all the time. I had no second mate. All I know of Captain Reardon's operations there was the fact that he came on board the tug Bazile, and they went to work to get the Enterprise off. I do not know who commands the tug Bazile. The men who came with the steam-pumps came on the tug Bazile. Those steam-pumps were a part of the wrecking outfit of the undertaking, I suppose. I never had any experience in wrecking vessels. I was very lucky before. That was the first wreck that ever occurred when I was aboard; never had anything to do with getting off a stranded vessel before, except with their vessel. I took a contract from an insurance man, and also two that went ashore down on lake. There were light. We must have been there on the island two weeks—one or two weeks—before the Bazile and wrecking outfit came. Before we went on the island I was aboard of the boat until this squall of wind came up. We stayed there for two or three days on the boat. Somewhere along about a week—I cannot tell you the date that we left or how many days, for I did not keep track—there came up a gale and we — ashore. The rock there is a smooth rock. We scuttled the Enterprise after she went on to keep her from pounding. She laid quite then. She did not jump any. She was heading about when she went on. We hove her around nearly one quarter to the west, I think, to try and get her off. Captain Williams did not do as I should have done if I had
70 been in charge of her. I suppose he thought that was a proper and safe thing to do. Captain Reardon came on the Bazile and I went aboard the Bazile. I don't know who had command of the Bazile. She came, I think—if I remember right it was Tuesday morning that she came. One pump would not free the Enterprise; they had to put the two. I don't know how long it took; I did not keep track of it. I had enough to look after. I do not know whether it was one hour or two hours or three hours. As soon as they got her pumped out the tug pulled her off, after they got her pumped out and the freight lightened up, after throwing aboard a lot of stuff. I cannot say how long the tug waited

here before she pulled her off after the pumps were put aboard; more than two hours; I won't be sure how long; quite a while. I cannot tell you the day they got her off and took her under the lea of the island. I cannot say into what water they took her. The tug Bazile came to anchor and hung onto us. She lay there astern of the Bazile under the lea of the island. She must have been there two or three days. Now, after she had gotten off, one pump was kept at work; one pump kept her free for two or three days there, and apparently had no trouble in doing so. When I was there that pump worked all the time I was taking those goods across. I was not there all the time. I was engaged in seeing that the men carried the goods across. I was there seeing that the men did not steal these goods or carry them away. I kept no track of the time we were doing it. I got everything aboard of her Saturday night. That is the time I went aboard of her. I went there the next mor-ing after the goods, after we got her off. I put a canvas under her that night. The next morning I went ashore and worked there from that time until Saturday night. That canvas was put under to jacket her. I took charge of the first
71 jacket. Captain Reardon said to put it on temporially, and I did so. When we started away from there the water was just about to her kellson; that is the way I kept it; just about in that shape. The suction pipes extended below the kellson. They would pump below that but not a great ways. You see the pipes are all full of holes; after they got down a peice the pipes would begin to suck. I do not know Delaney, who was with the wrecking expedition. There were two pumps; one that Carby had charge of and another pump. Mr. Quinn had charge of that other pump. Did not hear a conversation between Reardon and the men connected with the tug or expedition in regard to putting the Enterprise in proper shape to bring her down or with any one. When we left Green island the weather was not bad. We left there about 4 o'clock Sunday morning; along about that time. Up to 6 o'clock Sunday evening one pump just kept her all the time in about that shape. The pump was running in the usual way. At six o'clock we found the water gaining. I discovered that myself. The single pump was running at that time; we started the second pump. I gave orders to start that pump. The engineer, Mr. Quinn, sounded the whistles several times. One pump was covered; there was a canvas tend around the boiler of one; the front was not covered at all. The whistle was not under the canvas; I am sure of that. After I gave the order it did not take two seconds, sir, to start the second pump. We had a full head of steam on all the time. I gave them orders to keep steam enough to start her at a moment's notice. The engineer said that Reardon told him to keep ten pounds of steam. Now, says I, you keep enough steam to start at any moment. I do not know how much steam the pump had; about 50 or 60 pounds, I think. We did not free her any more; we just kept her so. That is all we could do. We could not prevent the water increas-
72 ing in the vessel after the second pump was started

There was very little. The water did not gain so long as the second pump was running. We run the pump until she ran down. She would stop, as I said before, and then we would start again. We kept one going that way. One of the pumps was running all the time, and the other one was running at intervals. I stood the watch that night. Major was one of my wheelsman, that was the watch. We had two watches on deck that night; the first watch commenced at 12 o'clock and went — at 2. Major was the wheelsman. There was one of the deck hands that was passing coal for the steam-pump—a man. That was all of my crew that was on. The rest of my crew were below. They had been working all day. The men were working through the day, hoisting out coal. I don't know — much coal those pumps were using. They were at work getting the coal out of the water. I don't know how much water there was there. We had to work by day to get enough coal for them to use during the night. I could not say how much there was of it. There was not a large quantity of coal on deck which the pumps could use before we started from Green island. The whole crew turned in then and went to bed, with the exception of myself, the wheelsman, and one man to pass coal. He got his coal from the pile below. I did not call the men; some of the rest called them. I was on deck all the time, with the exception of two or three minutes. I went up in the cabin and got a lunch and some cakes, and took it in my hands and went out again and ate them. I *I* looked to see how much water there was before I went and after I went, too. It was just the same before I went to lunch as when I came back; the water had not increased any. I discovered the increase about 2 o'clock. It did not seem to be over two or three minutes be-
73 fore she went down. In a case of that kind — is a pretty hard matter to tell the exact time. Our small boat or yawl, yes, sir, was damaged in carrying the goods from the tug to the island. The condition of this yawl-boat must have been generally — to all the men there. The condition of the ex-barge Enterprise was known generally to my crew there. It was talked about. I think the whole of them had more or less to say about it; all that was there on the Enterprise. I did not hear the men with pumps say anything. I do not know whether it was evident to any person and to all who were there what usage the Enterprise had received while she was stra-ned there. The engineer of one of those pumps was Carbry; of the other was Jones, I think. They were all strangers to me. I did not hear any conversation between him and Captain Reardon in regard to signals being given if any difficulty should occur on the way down. The w*h*eather continued during the day about the same. The w*h*eather was pretty good all day Sunday—, no sea to amount to anything. At the time she went down she was rolling considerably. She began to roll abo*y*t 9 o'clock that night. I think the wind was about northwest. It was not blowing very hard. We had a small boat on board the Enterprise when she went down. Some of the crew got into it; we got about five feet of her stern through the gangway. She jam*b*ed in the hatch, and we could not get her any further. She went down so quick we did not have

time to square her. She jambed in the gangway. There appeared to be a tool chest that the engineers had. It was a very heavy box, and it appeared through through the night; they moved it further over on the other side, and when we came to square the boat it hit against that and we could not shove her down. If the tool chest had not been there I think we could have squared her. The
74 boat was large enough to float us if it had been in good condition. I did not say she would have floated us off if the yawl-boat had been in good condition—if we could have launched her. I did not put that small boat in good condition before this trouble took place. I didn't tell Captain Reardon that I had done so. I fixed her up as well as I could. I took a knife and some oakum there and tried to fix her up as well as I could. At about what time did the crew turn in to go to bed? I cannot tell. It was after 6 o'clock; after I started the second pump. There is no doubt but what it is after that. I did not watch them when they went to bed. You speak about these goods that were upon the Enterprise. There were a portion of the goods on the Enterprise, but the larger portion were put on the *Enterprise*.

Redirect:

I did not employ the tug nor have anything to do with conducting the tug there. Captain Reardon paid me for my services on that wreck. I took his orders in all I did. In regard to the small boat, she fetched up so hard I think they must have moved the tool chest over in some way. This small boat is the same one I described in my direct testimony. There was no direction given by any one for swinging the boat upon the davits. There was only one davit left on the boat to swing her on; the iron sheeting on the Enterprise was all around her. The pounding she had received—it busted out her spikes in her railing; sprung the spikes out probably an inch and a half. Captain Reardon could not have missed seeing it. Captain Reardon, when I told him the boat's condition, said he would take all the precaution in the world, and he said he would only tow day-time; those are the words he used. I did not know he was going out until the next day, because he said the next for us to go ashore and get some wood. The inside of the
75 Enterprise, I suppose, is just like any ship. She was sheat-ed all over, and the only opening was in the limber boards, and the opening in the bottom could only be seen by taking out the sheat-ing. Captain Reardon had no apparatus to examine the bottom of the ship.

Captain HUTCHINSON recalled.

Examined by Mr. CANFIELD:

It was Sheldon rock where the Enterprise—I do not know what kind of rock it was; it looked like—something like a limestone rock; yes, sir. I noticed the character of the bank along the lee. Where we lay there it was very bold—almost dropped right off. There was no place around there that she could have been left in any

good shape during the winter, I do not think. I do not know how it might have been in the bay over there. As far as you could see there were rocky ledges that formed this harbor. If she had been under the lee of the island she would not have been exposed to these big seas; she could not have laid there since she sat in this shape (illustrating). I don't know how she would have stayed there; she might have slid back. I would not want one to lay that way for me. I did not make any examination of that harbor with a view of leaving her there. I do not know what Captain Reardon might have done, of course. I don't know of any examination more, then, as we landed around there. At one time we laid very close, and then after that we dropped away on account of the shift of the wind. I don't know how far we were at Green island from the harbor at Detour; probably 30 miles. There is no harbors in the channel between Coburn island and Big Manitoulin island; there is a channel there. We went over to Grummond's island for a lighter that was very near Detour; probably 25 miles. There
76 was a good harbor where we got the lighter. I think a wreck would have been all right where I got the lighter. The rock where she lay was shelving rock. It will run off for a ways; thon it will drop away; the further out you get the depper it gets. That is the kind of rock that wreck laid on when she sank. I did not make any soundings about that harber under the lee of the island more than where I let go my anchor. I used the lead to see what depth of water I was in; did not take any soundings through the harbor.

FRED. WAGNER sworn on behalf of plaintiff.

Examined by Mr. DICKINSON:

In Buffalo. I am a lawyer. I was on the steam-barge Enterprise in 1883 as a deck hand. I remember the occasion of her going ashore at Green island. It was foggy weather. There was some sea. It was blowing pretty heavy in the afternoon. The wind had gone down some. We ran onto the rocks of Green island, running full speed—I was up all the time—somewhere in the neighborhood of half past six; just at the supper table. It was a rocky shore on the island; Georgian bay or the head of Lake Huron. She ran onto the head of the island. She pounded pretty heavy that night. I felt her strike on the bottom of the rocks. I remained *the* board of her the rest of that week. We left her Saturday night and lived on the island. She ran on on Tuesday. I think it was the 20th. The next Saturday we *q*abandoned her; rather it was Sunday morning at 2 o'clock, I should judge. A big sea running that day, it would make it dangerous. There was a big sea, and we thought we would leave her before she—it got any worse. I could not say there was any fear of her going to *peices*. We did not know but it might grow worse and she might go
77 to *peices*. We thought we had better leave her. She began to make waters the *Firday* night before we left her. We were unloading her; trying to lighter her that afternoon. The tug

got hold of us and pulled her into deep water, and then they let her line go, and there was something wrong on the barge or something. I could not say, and they let go of our line and we went back high and dry further than we were before. She began to take in water forward. We scuttled her; we opened the sea-cock somewheres around the boilers; I could not say where. I heard the captain give the orders to open it. There was no break in her hull to let in the water Friday before we left her. It was nice weather in the morning. The wind started to come around to the southward about 10 o'clock and started to blow heavier, and the sea rolled in there. She didn't commence to leak until the evening. After we had landed I noticed the condition of the vessel; she was in plain sight. The wind and waves twisted her all shapes. The smoke-stack would go one way and the spars the other. She was wrenched so there was a difference in the movements between the bow and the stern. The spars would go this way and the smoke-stack that. The Bazile came there about two weeks after that; I should think it was now. I think it was on Tuesday or Wednesday; I don't really remember the day she came there. Captain Reardon took charge of the wreck and the crew after the arrival of the Bazile.

When he came there he gave us the order. He gave orders to get the steam-pumps aboard of her, and started us to work lightering her off, throwing a part of the cargo aboard and putting a part on the scow. He employed and paid me. His orders were obeyed in connection with the wreck after he came there. Mr. Carbys and
78 his son and Mr. Jones and Mr. Wing came in charge of the pumps. They came on the Bazile. I was present when the pumps were first put aboard. I helped put them aboard. The morning after we got the pumps aboard, about 10 o'clock, I guess, or in that neighborhood, they got the pump down, and pulled her off the following morning after putting the pumps aboard. The pumps were still working up to that time. They worked Saturday, and I think they worked a little longer than that. The sea-cock turned off after the water got down and we could get to it. We started to pump that morning—started one pump in the morning some time. I could not say what time it was the morning we took them aboard. The pumps run all night, I suppose. Some of the cargo was thrown overboard and some put on the scow. After she was relieved of the freight and of the water what was done with her? She was pulled off and taking around to a place of shelter, to a little cove that was there—a good place of shelter; plenty of water there and a good harbor for her. I was on the Enterprise every day after this. One pump ran every day—run when I was there. I was ashore some of the time and aboard of the boat some of the time. Every day I was aboard the boat the pumps ran day and night. The freight was nearly all taken out of the forward hold and nearly all through except from the after hatch. A lot of canned goods was left there—tea and one thing and another. I could not say what it was now. Yes, sir; some beans and some oats were left on the limber boards, I think, where the beans—amidships. They were not taken out at all. No, sir. I think there was some iron left

down in the hold of her skin. About amidships. There are different ways of ashoring down. You can shore them down from the deck—brace them from the deck. There was not any diver there to examine the bottom. I did not see any effort made to examine the bottom and a-certain the breakage of the bottom.

79 I do not know of any attempt being made to bore so as to see what the pressure was between the sheat-ing and bottom. I saw some evidences in the hold as to the water being betwee- the sheat-ing and the ceiling and the bottom. I seen a place on the starboard side; they raised a bag up and water came up there. It squirted up through the sheat-ing. There were no inhabitants on that island. I did not visit the mainland. The small boat was in poor condition; her planking was loose from her stem forward, and we went ashore with her in a sea; she pounded upon the rocks and the boards broke loose. There were oars, but we lost them. The boat filled up one night and the oars floated out of her, so that at the time of taking the Enterprise away there were no oars for that boat—nothing but a peice of an oar that I think we got off the tug; I am not certain. There was no tackle for launching the yawl or boat on the Enterprise after the wreck. The steam-pipe was cracked so it could not be used—cracked right around, I think; nearly the whole pipe was gone. I did not examine it all around. The smoke-stack was all right. I could see them both work through. I could see them work as she pounded. The steam-pipe was broken off; she could not use her machinery. I did not know of the intention to start when she did start. When she did start I was in bed. After she was towed into the harbor I was in the hold of the Enterprise. I was working in the forward hold. I saw the oakum had come out of her on the port side and along her covering board. I was not up on the Enterprise the night she went down. About 2 o'clock in the morning I was called. Two pumps were working during the time prior to the sinking. In the day-time when I was up one pump was working; before I went to bed they started the other pump. On the night she went down I noticed an effort made to communicate with the tug.

80 There — some whistles blown somewheres in the neighborhood of 5 or half past 5 four or five times. But no attention was paid to it, as far as I could see. I did not observe at any time after we left the harbor that Sunday morning the tug communicating with the Enterprise at all to ascertain the condition of her. She did not back up or round to or come near us. She was distant the length of an ordinary tow-line beyond speaking distance. When the Enterprise went down we were thrown in the water, swimming around there, catching onto things, until the tug picked us up. I saw Carbry afterwards dead on the Bazile; I seen him when he died. I did not hear any one else give any orders or directions in connection with that expedition from the time Captain Reardon came there.

Cross-examination.

Mr. CANFIELD:

As near as I can recollect, it was three or four minutes after I was picked up that Carbry died. I was picked up the same as I am now, excepting a little wet and cold. I was taken on board the tug. The tug picked me up herself. Carbry was not then on board. I was the first one picked up, the first one aboard the tug. I could not say how long I was in the water; it seemed quite awhile to me. I was asleep when they started with the barge for Green island. I do not really remember what time I turned in that Saturday night; I would not say. When I got up they were out in the lake—on Lake Huron. Good weather. The pumps were working. The pumps had no trouble in keeping the barge clear. I did not understand that it was the intention to bring the Enterprise down to the rivers. The mate had command
81 on the way down. I was on duty during the day. I turned in about half past 8 by our time. I undressed and went to bed. I could not say whether the others did. I did not have any thought or fear of the loss of the barge during the day. Some expressed fear. I do not — whether they thought so or not. The two firemen and deckhand talked that way; they did not want to come down. Those that belonged to the barge, I could not say why they came. I do not know whether any one came that did not want to. I didn't know anything about the starting of the boat. I think I would know if the rest did. I didn't know anything about the boat coming. I did not consider there was any danger. I was called about 2 o'clock and got up and dressed and came on deck. I heard whistles from the pumps after I came on deck. It seemed to me to be only two or three minutes after I came on deck before the Enterprise went down. Just as I came out of the cabin I heard the whistles blow. These were the whistles that I refer-ed to in answer to Mr. Dickinson. During the day only one of the pumps was kept going. That was all until the evening. I did not hear the order given to start the other pump. I was passing coal to Carbry's pump at the time and did not notice the second pump run. Probably two or three or four minutes at a time—I could — say how long—then she would stop again for want of water. There was a kind of a hole we made for her. There was freight there, and we — sucking water out of that hole. She would run for a couple of minutes and then stop; then after an interval they would start it again. That was continued up to the time I went to bed—running at intervals and then stopping. A part of the men turned in, I guess, before I did. There was two or three in the cabin with me. They were in there when I went to bed in the cabin, yet I could not say where the rest were. When I got up or called at two o'clock there
82 was a little breeze blowing off the bay; there was chopped-up sea there. There was no rolling of the barge that a sailor would be apt to notice. I did not see the small boat of the tug lowered to pick up some of the men. Some were picked up by the

small boat. The pumps were situated like this: We had a tarpaulin aboard there made a purpose to cover freight with—cover up probably half the barge—and they took that and put sticks around it and made a tent out of it around the forward side of the boiler, and Mr. Carbry had a peice of canvas nailed on the deck and hung down in front of his boiler—a peice of gunnage, I guess; I could not say what it was. The effect was to close it forward to keep the wind from catching us. That would not naturally interfere with the sound of the whistle. The whistle was outside of it. When I came on deck one end of it was pulled down. This canvas would not interfere with the whistle as it was put up originally. It was just forward of the pilot-house. The fire was forward too, I think; just put it forward of that. I am not mistaken about the canvas not covering the whistle. The whistle was right behind the smoke-stack on the inside. The canvas was forward of the smoke-stack. The small boat was damaged in going between the Enterprise and the shore up there at the island. I helped the mate repair that boat. We repaired it as well as we could there with the things we had there; put oakum in her seams. I think it would have floated us, perhaps, if it had not been jammed in launching it. The oakum worked out of the seams of the Enterprise about the covering board. I could not say how high it was after we had lightered off when she was loaded, though I should judge it was from one to two feet above the level of the lake when she was loaded. I do not
83 know what the difference of her draft was light and loaded. That would be above the level of the water probably 5 or 6 feet, I should judge, after she was unloaded. That is my judgment now; it is as well as I can remember. Reardon paid me for work aboard the Enterprise while she was working up there on the island. He didn't tell me at the time what it was for. I do not do anything else except work at the cargo, while we were working up there, except to put her jackets on. He paid me $30—not at the rate of fifty cents per hour—for time spent at the island. I did not make a bill. I signed a receipt. I don't remember what the receipt read now. I read it over at the time, but I don't remember. I didn't take very much notice of it. I helped load a portion of the cargo onto the Jennie, and after the Bazile came up there I worked on the cargo; worked at it all the time except when we were putting the jacket on her. I helped put some portion of the cargo on the lighter; from the lighter it went on the Bazile.

Redirect

I helped pass coal coming down on the home voyage. I did not get pay for my time on that voyage home. I was paid $30 altogether. I think it was 17 or 18 days I got pay for. I can figure it out, I think, a little over a dollar and half a day. I do not know what days were estimated or taken in when the single pump was running. Mr. Carbry had charge of it. It was Mr. Carbry's pump that was running all the time. Mr. Canfield asked me if the rolling of the barge was such as a sailor would be apt to notice. Whether a sailor would be apt to notice it would depend on the wind. She

rolled nice and easy there. You would not take notice to it, though it was not a heavy storm. A sailor could not take notice un-
84 less it was a heavy storm, and yet the rolling would be enough to open the seams.

Recross:

I could not say whether there was rolling enough to open the seams; the way she was twisted almost anything would open; that was while she lay up there on the island.

ODINA SAMPSON sworn on behalf of plaintiff:

I am an engineer at Lawrence Depew & Co.'s. I was on the Enterprise in 1883 as engineer, and was on her at the wreck. We went ashore at Green island, Monday night the 20th day of November, and we stayed there until—kept still until Friday night about half past nine, when she began to leak, so I went upstairs to the captain's room and told him she was leaking, and he came down and told me to open the sea-valves and fill her up, so as to keep her still; then we abandoned her Saturday. While I was aboard of her I observed her pounding on the rocks where she rested. She struck very hard. After I went ashore I saw her then; she was pounding even after she filled with water. The motion of the vessel and the pounding on the rocks cracked the steam-pipe; I saw that. I kept the engine running until she was full of water. The first time she was pumped out Captain Reardon told me to fix up the engine so we can use it a little, and after that he told me not to fix anything, so I disconnected the connecting rod so she would run easy, and the wind used to turn the wheel once in awhile. From our position on shore we were in plain sight of the Bishop after we left her. I did not see anything that indicated she was striking and being injured. I observed the movement of the boat as she was moved by the waves on the rocks. She looked in pretty bad shape. I saw the
85 mast would come right in line with the steam-stack. She lay there in that condition and with movement not quite three weeks. I was on the Enterprise when it started out for that harbor. It was a good harbor after they moved over from the other side of the island. I knew they were going to start on the lighter after we went o-t the other side of the island. I heard some of the men talking about it. I did not know we were going to start on the morning we were started. I knew we were waiting for a calm and nice weather. I did not know we were going that morning. Captain Reardon had charge of the men in connection of the wreck. I took the orders from Captain Reardon. I rendered service on the Enterprise. I helped the engineer with the pump to fix the pump, and after that to work at my engine to disconnect it. I worked after the Enterprise left the harbor in supplying the pump with coal; in passing coal. Nobody told me to do it. I had my pay from the Continental Insurance Company about two weeks ago at Mr. Canfield's office; Reardon was present. He was present when I got my pay. I was paid for 20 days' work, commencing the 20th of November and ending the 10th of Dec.

Cross-examination by Mr. CANFIELD:

I said we were waiting up there for fine weather. We were waiting up there from Saturday till Sunday morning. I didn't know nothing about *ti* until we started Sunday morning, but knew they were waiting for fine weather to take the Enterprise away. I didn't know where we were going; some one told me it was down to Owen Sound and some down to Port Huron; that matter was generally talked about among the men. They all understood it; all expected to start as soon as the weather got calm. When they had started I was in my bed. I went to bed as usual. I got up about 6
86 o'clock at breakfast, and during the day I passed some coal to one of the pumps. I was employed in that way half an hour once in awhile, sometimes more and sometimes less. I went to my *I went to my* room about 6 o'clock, but I didn't go to sleep until nine or ten o'clock. They kept one pump running until six o'clock Sunday afternoon; the other pump used to run when the other pumps stopped to clean out their fire or something or snother; the other pump started during the time the other one stopped. It was Carbry's pump that was running ducing the day, and when the pump stopped on account of the fire or anything else they started the other pump. I dod not know during the evening how much of the time the other pump was running. I talked with Carbry about keeping the pumps running. When I woke up my second engineer told me that the pump was stopped, and so I came down-stairs, and I asked young Carbry why he kept the pump stopped so long. He told me it was none of my business. I told him it was some of my business, because our lives were in danger and I would like to be safe. He told me he didn't care about the boat going down. He says, I have a friend on dock that will throw a line to me and we will be safe. And I went on and started the pump forward. They had to keep steam up on Carbry's pump all the time, and they kept steam in Quinn's pump and kept a good fire, so it would not take long to start—take to- long to start on account of the water again. I helped to start the fires after I came on deck to 2 o'clock. The engineer of Quinn's pump asked me to make fire for him. I did it. We generally carried from 70 to 80 pounds; sometimes more. When I made that fire that night we had about 60 pounds; maybe more, maybe less. The weather when I was called, about two o'clock, was quite rough. I can't tell how the wind was. I think the
87 wind was aft. I did not undress when I went to bed. My fireman called me. He told me the boat was going down. I sat on the side of my bed, and I thought he was telling some joke on me, so my second engineer woke up and went outside the room. He told me it was true—that the boat was going down—so I went forward and looked in the hold, and found it was about half full of water. I came back to my room and took my life-preserver and went on deck again; so the engineer asked me make a fire for him, and I did so; and then he hollered to the other men to launck the yawl-boat; the boat went down before we launched it. I do not remember to have heard any whistle at all from the pumps

until after I put on my life-preserver and came on deck. I worked on shore in helping to save the goods up there. I had my pay for that time I worked for the insurance company. When the captain left there he told us to save all the cargo we could; so we worked there every day to save all we could. I knew the insurance companies were interested in that cargo. I didn't know it at the time; I did afterwards. I expected the insurance companies to pay me for that, and they did pay me.

Redirect examination:

I wrote a letter down to the Continental Insurance Company asking for my money, and they sent a letter back in answer. They told me to go to Mr. Canfield's office. (Objected to.) Dan. Jones had charge of the blowing of the pump whistle; it blowed six o'clock Sunday evening and gave a good sound; the whistle wasn't covered up, but the front boiler was covered up. I had fallen to sleep
when I was first called. I did not know *weather* before I was
88 called if the whistle had blown. Mr. Canfield asked me when
he paid me if I heard the whistle. I told him, Yes; I heard the whistle after I came on deck. I talked it over, about the accident that night, when I got my money. Mr. Lyon, the mate, was the officer in charge of the Enterprise after leaving the harbor of Green island. I did not receive any notice from Captain Reardon or any instructions what signals to give in case the Enterprise should meet with misfortune.

Redirect:

I heard the tug whistles after I was in the water. I did not see any whistle on Carbry's pump at all.

COURT: You have sworn four witnesses as to the circumstances of the loss. You can swear one more, if you choose. Then I think that will do, so far as the general story is concerned. If you have any witnesses whose attention you want to call to a particular fact, you can do it, but there is no use multiplying the story.

WILLIAM H. DOYLE sworn on behalf of plaintiff.

I live in Detroit. We are the managers of the Cockburn Island Timber Co., my brother and I. We furnished the steam-barge that took off a good many thousand dollars' worth of goods from the Enterprise. We furnished the steam-barge from Cockburn island. I don't think anybody employed us; did from the final result of it. We sent that barge to Cockburn island with supplies to bring down a cargo of pulp wood. Captain Williams went there with her and agreed to pay for her. I had an interview with Reardon at the insurance Co.'s office, the Continental and Big Four together, as I
understood it, at Buffalo. I di-n't know any of the parties
89 present. I went in there and asked for the manager, Crosby
or Dimmick, and Mr. Crosby was introduced to me, and I told him who I was, what I was there for; and he says, This is something I don't attend to; our man Reardon attends to all those mat-

ters in connection with a wreck; and he called him in. I wanted to get something for the work we had done in the matter of wrecking. Reardon and I had some little conversation. I didn't get much satisfaction out of him, and I came away. Mr. Crosby was not present that I know of. There were other persons there. Crosby said Reardon attended to all those matters—in the matter of the wrecking of the barge Enterprise and in settling for the services we rendered.

Cross-examination:

I was on- of the charterers of the A. H. Jenny. There were others interested with me. The pay for the services I wanted was for the work I did on that boat and the bringing of the goods down. We did the work, and we paid three hundred dollars for doing it, too. That was another beautiful thing—for the privilege of doing it for the Continental Insurance Co.; for the privilege of carrying these goods; that is what we paid in the end. I don't know where the goods were delivered. We took them out of her here and put them in the warehouse. I was not there at the island w-ere they were at work. I saw them when they came off here. That is what I wanted pay for—for my services rendered in saving these goods. That is it, and I never go- it.

SAM. G. COWELL sworn on behalf of the plaintiff:

I was the second engineer on the Bazile, and was on the Bazile the night the Enterprise went down. I could not say as to the length of the line to the Enterprise, I am sure. It was an ordinary towing line. It was not within speaking distance. My en-
90 gine-room where I was stationed was probably four feet to the tow-post. I do not know how the Enterprise became started; how the tow-line became separated between the Enterprise and the tug. Well, I didn't see the break in the tow-line, though the tow-line coiled up on the fantail and run out again. W-eather it broke or not I don't know. It must have broke; it flew all around the fantail ans flew up around my head. The engine was not stopped at all. After the tow-line was cut I got three bells to check. I heard the whistle from the Enterprise. I heard it plainly in the engine-room. It wasn't very long—a very few minutes—after that I checked. There was only one check. I did not have any lookout aft on the Bazile. There was no lookout aft; not down on the fantail. The tow-line was cut after it parted. After it ran out I heard somebody say, "Cut the tow-line," and I saw the mate run down with an axe, and just about the time he went to cut the tow-line I got three bells to check. I was on watch in the engine-room as second engineer. There was no signal given to me to check before I came on deck. I found Captain Reardon calling up the men; opening the doors. He was behind the *taxas*. He and the mate were calling up the men; they were opening the doors. I heard Conroy cry, "Turn out!" I could — say w-eather the captain of the Bazile was on deck that night at the time of the accident. I didn't see him before I started from Green island. I went over to

the Enterprise in the yawl-boat to take some men. It was pretty much all over her and down in the hold. I saw she was strained on her starboard side. I noticed daylight, and I went and looked through, and I could see men through. I could see right through the cracks in the hull. I- wasn't any more than a
91 crack—a natural crack that the oakum was out of. I could see right through the crack in the boat.

Cross-examination:

This crack may have been made by the covering board; I am not positive. I know it was right up in close to the deck. It would be probably a foot or a foot and a half above the water line when she was loaded. When she was light it would be a long ways. I do not think there would be much water get through that crack if she was light. If she was in heavy sea some would get through; the spray might dash in. It was in the morning some time when I saw that; it must have been somewhere near breakfast time; I am not certain what day. I was the second engineer of the Bazile. I knew both of the Carbrys by sight; that is all. I was on the Bazile when she started to go to the Enterprise first. The last dock we were at was in Springwells Clark's dry dock. I am not mistaken about that; we were at work at the vessel on Chantry island. When they started from here I don't know w-eather they started for the Enterprise or where they started for. I remember their being up there at South Hampton or Chantry island at wor'k at the vessel. We were there about three days, and from there we went to the Enterprise. Carbry and his son, with the pumps, came aboard from the Manitoba off South Hampton island. We took them there. S. A. Murphy owns the Bazile, I believe. The Carbrys didn't go up with us after all; we got them at South Hampton. They were on the Manitoba when we got up there. I don't know how they got aboard her. They came aboard of us in South Hampton. They went with us to the Enterprise. They and their pumps went aboard the wrecking outfit as a part of the expedition. I was in the employ of S. A. Murphy & Co. Captain Hutchinson was the master of the Bazile. The mate was Chas. Conroy. I didn't know the Carbrys—just I knew them when I saw them; that was all.
92 I heard whistles from the Enterprise just a short time before she went down. I did not hear any from her at any other time. When she went down it was my watch, and that was the mate's watch. The mate was in command. As I started to go upstairs from the engine and as I came upatairs I saw Captain Reardon going around calling up the men. I met him as I got upstairs. I met him somewhere near the back part of the *texas*. He and the mate were calling the hands to get out. I got three bells to check shortly after I got back to the engine. After the bells to check she turned around and headed onto them. I didn't see where the line parted. I think the line broke some distance off the deck. I didn't see the line break. I am not certain that line broke. I heard the order to cut the line, and it was obeyed.

THOMAS CRAIG sworn on behalf of plaintiff:

I am by profession an engineer. I have been chief engineer for three or four years, of three or four different companies; been in the business about thirty-three years. I have been wrecking, running steam-pumps a good deal of the time. I have been an engineer on the lakes since 1851. I have done more or less wrecking for the last twenty-five years. My principal connection with wrecking commenced in 1871. I have been as an engineer for the last two years. I have had charge of the Detroit Wrecking Company's steam-pumps and wrecking jacks. The wrecks I have been employed upon have generally been pretty hard wrecks to get. I have been employed on or about twelve altogether. The ordinary provisions are a tug with tow-lines, canvas, boards and battens to put outside the canvas, nails, spikes, steam pumps, and the diving rig and diver.

93 Q. Do you know whether or not on the lakes it has been customary for the last five years for any wrecking expedition to go without a diver?

Objected to, as this witness has only been in the wrecking business for the last two years.

A. I have been connected with wrecking since 1871.

Question read.

A. It is not—that is, what I call *a* wrecking expeditions have tools necessary to get the wreck off. You might hire a tug somewhere else, but in starting expeditions to go for a wreck is to go with a diver and a pump and diver and rig.

Q. Will you please state whether it is customary in wrecking expeditions to take ship out of a harbor across the lakes that has gone ashore upon the rocks without examining the bottom with a diver?

A. It is not.

Q. I believe you have no interest in the case except as administrator?

A. No, sir; no final interest. Any interest I have in the case would be on the wrong side of the ledger.

Cross-examination:

Q. I don't know that I understand exactly your answer to the question. You said that in a regular wrecking expedition it was customary to send divers, but a tug might be hired to go to a vessel.

A. A tug might be hired to go without any appliances at all to get her off, for that matter.

Q. A great many vessels are wrecked and brought into port without a diver being used at all.

A. They are not. A vessel may get ashore, not pounding

94 on the rocks, and be pulled off without a pump being put on her, and be brought into port without a diving suit being used on her, but it is not customary. Vessels that pound on the rocks and sink are not brought into port without a diving dress and diver being used on her. It is not customary. In the thirteen cases I have had to do with it has not been done. I have not done all

the wrecking business on the lakes for the last two years, but my familiarity with the business is such that you can testify it is not done continuously—not a vessel that goes on the rocks and pounds herself to pieces and sinks—pounds her bottom and sinks. It is not customary to take them off the rocks and bring them into a safe port without the vessel bottom being examined by a diver. Take a vessel that has gone upon the rocks, and to prevent her pounding she is scuttled. They are raised and brought to a first safe place where a diver can work at them. The diver can't work at them there for the reason of the rocks; he can't get at the bottom; seldom, if ever, brought in here without that being done, at least in these thirteen cases since 1871 that I can repeat. The divers are usually employed by the wrecking company, such as Murphy and Grummond. They are generally hired by the year at so much a day or so much a year, and then if any wrecking company wants *wants* to use them they have got to pay ten dollars a day. When they are diving for the wrecking company they get about three dollars a day when they are not diving and about ten dollars a day when they are actually using the dress. Sometimes a liberal wrecking master will give them twenty dollars when it is cold w*he*-ther—a little extra. Then the wrecking company us-ally send divers they have al*w*ays on vessels I went for, except one, and the*m* we had to send from Leland to Mackinaw for a diver and dress before we could do anything. Then the *w*ecking expeditions that is sent out by the wrecking company comprises the tug, officers and crew, pumps, engineers, and helpers, and the diver and d*e*ss, canvas, nails, and spikes. Pontoons are not used in shoal water much. A pontoon has got to have about seven or eight feet of water or you can't get any lift on her. It draws about two or three feet.

95

Q. Do you remember that the Manitoba was gotten off with the use of pontoons when *strained* on Chantry island?

A. I worked on her all the time when she was being gotten off. I had charge of Murphy's pumps; that was in the spring, 1884. This wrecking company which I was connected with Mr. Murphy had charge of, and he usually sent out the tugs and her officers and crew and pumps, engineers, helpers, all as a part of the expeditio-, as well as the diver—that is, where they took contracts. This was a contract job, this Manitoba.

Q. All hands sent out were in the employ and paid by the wrecking company?

A. No, sir; that is not the custom. The engineer of the pumps is in charge of the wrecking master on the wreck. They have got to do just as he tells them; that has been my experience.

Q. Don't you know, as a matter of fact, that in all these expeditions that Murphy sent out in the fall of 1883 the bills were made out to him, and he would pay all the men connected with the pumps?

A. I don't know that to be the fact. I think the money comes through him, as a general thing. I think the bills are made out

through him and he pays them. He paid me, and he pays the pump engineer just as he pays the engineer of the tug.

96 Plaintiff rests.

Mr. SWAN: In accordance with the objection made during the taking of the testimony and your honor's intimation in regard to what *as to what* your course — to be, I now ask your honor to direct a verdict in favor of the defendants The Thames & Mersey, The Union Ins. Co. of Philadelphia, and the Insurance Co. of the State of Pennsylvania on the grounds there is no evidence to connect them with this case and on the ground of a failure of proof to make out the case.

After an argument upon Mr. Swan's motion the court decided it would postpone the further consideration of the motion for the present.

Counsel for plaintiff then offered in evidence the letters of administration of said Thomas Craig, which are not material to this bill of exceptions, defendants' counsel conceding said Craig to be the duly appointed administrator of the estate of said deceased.

THOMAS CRAIG sworn on behalf of plaintiff:

I am the administrator of John Carbry. I knew him in his lifetime about 27 years; 25 or 27 years. He has worked with me; both followed the same business. I have been engaged on the lakes as engineer about 31 or 32 years. Carbry was not a sailor. His profession was simply an engineer, steamboats and pumps. Once in awhile he would go with a pump, but very seldom; but never was employed as a sailor. I think he was steamboat engineer 24 or 25 years on the Great Lakes. He had run a steam-pump once in awhile. Perhaps one year he would run a steam-pump for about 10 days or so, go out with an expedition, and then, perhaps, there would be two or three years when he would not go out at all. Steam-pump business was not his profession. He did not own this pump that he was running. He occasionally went out with the wrecking expeditions when business was full. I think he was with no expedition in the summer of 1883 and this one he got drowned on. The Manitoba was *apr*t of this expedition. He started out from here, and him and his pump was put on the Manitoba, as I understood it, previous.

97 DANIEL G. MCALPIN sworn for plaintiff:

I live at Detroit and have lived there about 24 years; I am a mariner; vessel business. I have been on the lakes, not on the ocean. I have been so engaged about thirty years. I have been in almost all branches of the business of latter years. I have been a wrecking a great deal of the time. I have been master of a wrecking ship, the steamboat T. F. Parks. I have had charge of wrecking expeditions, raising vessels, and that sort of thing.

Q. Now, Capt., I put this question to you—notice the details *me*bodied in the question: Suppose a steam-bar*he* had gone ashore in the northern part of Lake Huron upon the rocks; had pounded

upon the rocks for ten days or two weeks, subject to the winds and waves of Lake Huron, in an exposed position, exposed to all the winds and waves of the lake, and she had been after such exposure and after such pounding upon the rocks taken into a harbor—smooth water—protected from the winds and waves, and the month was December, would you consider it prudent to take that barge across Lake Huron without ascertaining the condition of her bottom?

A. No, sir; I should not think it would.

Q. You think it would be necessary and try and examine her bottom?

A. Yes, sir.

Q. Would it be prudent?

A. Not after you had got her into a safe place, more especially at the season of the year. The season of the year would influence my judgment somewhat.

Q. Will you state whether the diving apparatus is an ordinary incident of a wrecking expedition?

A. It belongs to all wrecking expeditions; it does if you go out as a wrecker.

98 Q. Would you consider it prudent to take a vessel out that had been pounding upon the rocks ten days or two weeks; take her out of a safe harbor across Lake Huron without having her bottom examined?

A. I would not consider it prudent.

Q. In addition to examining her bottom, if you hadn't the facilities there for ascertaining the condition of the vessel, what would you say as to the prudence of leaving her there?

A. No, sir; I should — it was better to leave her there.

Q. What facilities do you refer to?

A. You would have to get her into some still place and get a diver down and examine her bottom; see if any rock was in her bottom or some large holes that might be filled up with something.

Q. Will you state whether it might not be true that the bottom of a ship may be broken, and yet she may float with a tight sheathing?

A. It depends entirely on whether her limber boards are fastened down.

Q. What is the effect of taking a ship that has been pounding upon the rocks, so far as developing or showing the external injury to which she has been subjected by the pounding?

A. I don't understand exactly.

Q. What is the effect of taking a boat into the open lake and on undergoing the ordinary sea and resistance of—whether upon developing the strain to which a ship has been subjected by pounding upon the rocks?

A. Of course, in taking a vessel through the water you are subjected her to greater strain and pressure. She would naturally leak more than she would in lying still.

99 Q. I suppose the vessel might have been subjected to straining and pounding upon the rocks; might lie perfectly still and safe and one pump might keep her free and safe in a quiet harbor, and

yet if she were towed at a rate of six or seven miles an hour through the open lake the seams would be opened?

A. Yes, sir.

Q. Where it is known that the ship's bottom is in such a condition as to require a canvas jacket, will you please state in what way the canvas jacket should be fastened to make it prudent to go into the open lake with a wreck in the month of December?

A. If you have a prepared canvas jacket, it is made almost like the vessel.

Q. That is, a prepared one?

A. That is, prepared for her, so as to be drawn upon and secured both forward and aft—all around.

Q. Is a prepared jacket an incident of a wrecking expedition?

A. There have been cases where they have made jackets to put on a vessel, but of late years we have not used them.

Q. Suppose you haven't a prepared jacket, how does prudence dictate the jacket should be fastened if it is not prepared?

A. I don't know of any way. The mere drawing of the vessel's for-sail or square sail under the vessel is not the proper way to put canvas under a vessel. If the vessel has been upon the rocks and she is likely to have some large holes in her, plank broken between the frames, why, merely drawing the canvas under there and getting the pressure of the vessel upon that canvas without any
100 plank under it would not do any good. We usually go to work and plank the whole outside of the vessel and then put the canvas on and batten it afterwards.

Q. What is the battening?

A. We prepare lath or any inch lumber with nails in it ready for the diver when he goes down there to put it on the *dege* of the canvas, and sometimes in the centre to keep the canvas from bagging.

Q. Would it be prudent to go out with the ship unless the canvas was battened?

A. I don't think it would. It depends upon the bottom the vessel was on, or if she was on a sandy bottom and while the oakum had worked out from the effect of the *whether*, then, perhaps, batten it, forward so the water could not get in and wash away the oakum—break it up. We sometime- do it in that way. But if the vessel had been on a rocky bottom, liable to have holes stove up through the bottom, I say she ought to be battened. I have always done so for everybody else pretty much.

Q. Would you take ship out of a harbor into the open lake without examining and battening her, that had been pounding upon the rocks?

A. I would not consider it good judgment.

Q. Do you consider putting ropes around canvas battening it?

A. No, sir.

Q. What is the tendeccy of canvas when towing behind a tug—a tug that *tkaes* her at the rate of six or seven miles an hour? Do you know the Bazile?

A. Yes, sir.

Q. What would be the effect upon the canvas in a wreck
101 such as described, not battened, if towed behind the Bazile?

A. The Bazile would probably take that vessel along about seven miles an hour or about seven miles an hour, and of course it depends entirely upon the length of line we the- the wheel has any more effect as to the current that she is going through. But you take the force at which she is going through the water—six or seven miles an hour—and you can imagine, of course, that the canvas has got to be secure so that the water can't get in between the vessel and the canvas.

Cross-examination:

I live here at the present time. During the past season I haven't be*ing* doing anything particular. Last year I was up at Sand Beach. I had a tug there. I had a contract with the Government. Some two years before that I was in the fish business on Lake Huron. Before I was in the fish business I was tugging. I think it was the one I sold to the Gover-ment—the Myer—a little tug I built expressly for the fishing business. Before I went into her I was in the freighting business; also wrecking. Fishing, I went into that as an experiment, and it cost about $3,000. I went into the fishing business somewhere along about 1880 or 1881. Before I went into the freight business I had this small tug and was working for the Government. I worked for the Government two seasons. In 1878—I forget now—I think it was in 1869 that I owned the steamboat Parks and was wrecking with her. The steamboat Parks went out of existence in 1870. I have been in the -recking business twenty years, of- and on, since 1870. I have raised several boats.
102 The greater portion of the boats were raised out of deep water and some of them taken off the beach and brought here. I will commence at 1869. I have got since that the tug Goodenow, Lake Huron, 90 feet of water; tug Seneca, Detroit river, 40 feet of water, for myself. Right opposite the repair shops of the Great Western, prop., Galena, Northport. That was somewhere the year after—that is, since the schooner Mary Noogan, Cove island, Lake Huron, for John Adams—well, I had to batten her altogether. Tug Milldridge, that was in Lake Huron, 40 feet of water, for Gilchrist. The schooner Porter, Detroit river, for Capt. Grummond; tug B. P. Clark, 35 feet of water. She was at the foot of Hog island. She rolled over and filled right up here in the river. Steamer Parks, for myself, Detroit river. That was in 1870. The tug Milldridge, prop. Hoard, Lake Erie, 55 feet of water. There — hundred tons of coal aboard of her to Port Stanley; raised her, coal and all. The Dunlap, in the Saginaw river; barge Colorado, Sand Beach; tug Colton, Detroit river, for S. A. Murphy; that was last fall. They had worked at her 22 day- and finally Moffatt came to me to r*ai*se her. It was in 35 feet of water, opposite Clark's dry dock; b*o*ke her chains and went down there; she was an iron tug. I had raised several in Lake Huron.

Q. As soon as you got these vessels up and got them into condition so they were safe, in your judgment, to bring into a port of re-

pairs, you got the services of a tug or had a tug and towed them where you could find a dry dock, didn't you?

A. Yes, sir; I brought them from where I raised them; brought them to Detroit here and put them in dry dock. That is understood by all who engage in that business. I never owned steam-pumps, but had steam-pumps with me on those expeditions. I have never been to Green island. I know nothing about a harbor up there, although by the chart of course it is near Cockburn
103 island. I know so far as *our* charts say and the condition of the shore all below and above is a rocky bottom. It is not a good place to leave a vessel on a rocky bottom if you can help it. About limber boards being shored down, if they are nailed down, spiked down, it will answer the same purpose. If there is iron onto them sufficiently heavy to withstand the pressure that is on the vessel, why, then, of course, it will hold them down. I would not think it safe to take a stranded vessel across Lake Huron without an examination, especially on a rocky bottom. Of course, if I had a diver there I would put the vessel into water, we will say four or five feet deep under her bottom, and let him make a survey of the bottom. If I could not get divers I would use the best judgment I had. If I were on the spot, seeing the vessel and watching the operations, I certainly would know more than I would if I was not there.

Q. Suppose a vessel to have lain on a smooth, shelving rock, a vessel of 120 or 130 foot keel, and her bow was raised up only a foot or so higher than her stern; she lays there on a smooth shelving rock of that kind. Now, — there any universal rule of employing a diver to examine the bottom of that vessel before starting with her for a dry dock?

A. If a vessel was taken off by steam-pumps and brought into some quite harbor or some quite place, then would be the time to examine the vessel. Nothing more than precaution with some men and, of course, other- would take their chances. That is the only way I would say. There is no universal rule about it that I know of. Wrecking expeditions go out as frequently without divers as with them and get vessels and bring them in.

Q. Now, suppose that besides the vessel being kept free by
104 one pump a jacket is put around her, the two pumps still remaining on board, the weather being good, would you think it imprudent to start with that vessel for a port of repsirs across the lake?

A. I think I answered that question before. I said I didn't think it would be safe unless you examined the bottom of the vessel and battened her. At least at that season of the year, after being on that bottom, I have taken vessels across the lake when it was necessary to keep the pumps going in order to keep her free. It is a common thing to take a vessel a distance of 200 miles and over across the lake, leaking so badly that it requires more than one pump to keep them free. No doubt about that — all, but you generally know where your leaks come from. You know they come from the bottom, but it is well enough to ascertain where they come from.

Q. Isn't it common to bring vessels from Lake Superior to Detroit for repairs, leaking so badly from the time they start that it requires two or three pumps to keep them free all the time?

A. No; I don't know that it requires them, but they have had as many as five pumps on a vessel. If they require so many pumps as that I don't think it would be good judgment to take them out. I have towed stranded vessels across the lake where I had to keep more than one pump going all the time. It is generally very cold and bleak. At that season of the year it is the storms that is dangerous. Suppose the weather not to be stormy—fair weather—the difference, whether it is December or November, depends on the distance you have got to go—the exposure you have got to contend with. My opinion is governed by the fact that at that season of the year storms may be apprehended.

105 Q. Now, suppose a vessel upon the rocks—upon the kind of rock I have described at Green island; two pumps free her in four or five hours and she is pulled in deep water, and one pump keeps her free from that time, say Thursday morning, until she starts at four o'clock Sunday morning, and then keeps her free while being towed from Green island down until they get off Port Austin light, no difficulty being experienced up to that time, the weather continuing good. Suppose the vessel was leaking so badly as to make it necessary to attempt to bring her into a port of repair, there being another pump aboard to use in case of an emergency, would you think that imprudent?

A. Well, I should consider that vessel was not leaking so very badly, of course; but you are aware we have had instances here where there have been stone and rocks and boulders in a vessel's bottom by reason of being on a rocky bottom. If I got down in the neighborhood of Port Austin light, no trouble having been experienced up to that time, I would consider myself justified in continuing with the vessel for Detroit or Port Huron. If I had got down half way across Saginaw bay, under those circumstances, one pump keeping the vessel free, there being another pump on board and the weather being good, I would come right on. That would be strong evidence, would it not, that she was not leaking so badly but that she might come along?

Q. Mr. Dickinson has asked you something about the effect of towing upon a canvas jacket, and I understood you to say that the effect would be modified by the length of line which connected the tug with her.

A. No; I said that it would be as far as the current of the tug's wheel was concerned. There is considerable current from the
106 wheel of one of those tugs if you have a short line. The short line increases the current upon the vessel which is in tow: so prudence requires you shall have a good long line. About 400 or 500 feet of line ought to be carried. When a vessel tows easy she steers easy and the effect of the current is less upon her.

Redirect:

Port Austin is quite a long ways from Point aux Barques and of course they were out almost in the middle of Saginaw bay.

Q. But suppose you take into consideration the question of prudence in starting out; suppose it to be good weather from the time she left Green island, leaving Green island at four o'clock in the morning, and suppose that at two o'clock the next morning she suddenly went down, the notice to the crew being that the water was gain-g but four or five minutes before she went down, what would you say was the condition of that ship's bottom under those circumstances, with two steam-pumps working?

Objected to as immaterial, and therefore the plaintiff did except to the ruling of the court *instained*.

Q. If you had no diver and couldn't get one, would — take out a ship from a safe harbor which had been pounding upon the rocks for ten days or two weeks—would you take her out at all in the month of December?

A. As I said before, to best of my knowledge, as I had got the vessel into a safe place that season of the year, I would leave her there until I knew in what condition she was in. You couldn't ascertain her condition accurately, could you, without a diver?

Q. State whether you ever took a vessel that had been
107 pounding upon the rocks across the lake in the month of December, with people on board of her, towing.

A. I have not.

Q. You were asked as to fastening down the limber boards by putting things upon them, and you said that anything that would fasten them so as to resist the force of the water would be sufficient?

A. Yes, sir; there is a perfectly simple way to fasten the limber boards down by shoring from the deck beams. That is the way we usually do; that is about a- quick a way and as little expense, and the limber boards are easier got up again. It is an absolutely certain way.

Q. Would you consider it imprudent where the vessel describe- to you *have* been lightered, the freight had been removed—forty or fifty tons of freight—to put that freight back upon her deck and start back across the lake with her?

A. Well, you are only increasing the leakes so much more, whatever weight you put on the vessel.

Q. As a matter of prudence and good seamanship, what is the consideration of *aggos* sailor, *aggos* wrecker, in case of a wreck where you have property and life?

A. It is to use direction and good judgment to save this property and life.

Q. You have been asked by Mr. Canfield whether it was prudent to take a wreck across the lake where you have two pumps aboard, and you have said in some cases it would be prudent. Would you think it prudent to take a wreck across the lake that had been

pounding upon the rocks in any season of the year, having
108 upon that wreck human lives, without arranging a system of signals or commu-cation with the towing tug?

A. I should say it would be necessary to hold a survey on the vessel; find where she was damaged.

Q. I call your attention especially to that matter of signal. Would you take such a wr-ck across the lake in any season of the year without arranging signals?

A. Oh, no; at all times I have always understood—the pump men especially, they were always to signal whenever there was anything wrong. It is the duty of the captain of the tug. It ought to have been arranged before they started off, if anything went wrong, the vessel was leaking more than she had, to signal the tug. .

Q. Would it be prudent to start upon a vessel across the lake with a tug in that condition without making special arrangements for commu-cation?

A. I should consider it was necessary to be done.

Recross:

The signal is that the steam-pump man blows his whistle. Every man of experience in this business knows that is the way to signal a tug, by blowing the steam-pump whistle. Every steam-pump engineer ought to understand that, but we have so many growing up I can't say they do.

Q. If you were taking a wrecked vessel with a steam-pump aboard you would *except*, as a matter of course, to hear from the whistle on the pump if anything was out of order?

A. Yes, sir—from the safety-valve if they had no whistle.

Q. And you would *except* that an experienced engineer would so signal you?

A. Yes, sir.

109 Re-redirect:

An arrangement of signals could be made by lights; but, generally, the most of those steam-pumps have a little whistle. In case the boiler should bu-st or break down, it is usual to have a special signal by swinging lights to show that something was wanted.

Q. Will you please state whether, in case a vessel has been wrecked by pounding upon the rocks for a week or ten days or two weeks, and she is towed out upon the open lake in the month of December—whether or not it would be prudent and good judgement for the tug towing that vessel to communicate with her to ascertain the condition of the pumps and her condition.

A. I didn't hear the last of your question.

Q. Whether it would be prudent in that case for a tug or the people upon the tug to commu-icate with the wreck to ascertain her condition?

A. I suppose it would be better to do so to know they were getting along.

Q. Would it be a matter of good judgment to do that when there are lives upon the wreck?

A. I think it would be about as well to have it so.

Q. Is it customary for a tug to stop and make inquiry of the disabled vessel as to her condition without awaiting any word from those on board the disabled vessel?

A. In cases I hav*d* had anything to do with, there was always some responsible party on the vessel and a watch kept to see the vessel was in good shape or no*r* any worse than when we started out; communicate with the tug. I never have stopped. I don't know as I have ever known of anybody doing it, as long as everything was going along all right. If everything was not going
110 along all right I would *except* some signal from the vessel. I took a little vessel off down here at Pointe aux Pellee island once and the vessel's rail was under water all the way across, but I told them to be sure to give me notice if anything went wrong.

Q. Mr. Dickinson asked you whether signals could not be given by lights?

A. We have always, as far as my experience has —, done it by the steam pumps or boiler or some signal can be arranged with lights, if it is so arranged. If I should see a light displayed from a vessel I would understand it meant according as was agreed upon. If such a light is exhibited or swung or moved, that is an indication they want to communicate with you, if it is so agreed at the start; but if there were whistles I would re*p*ly upon the whistles.

And thereupon plaintiff rested.

WILLIAM H. HUTCHINSON sworn for defendant.

Examined by Mr. SWAN:

I reside in Port Huron. My business is sailing. I have sailed upwards of twenty years, 8 seasons as master, on all classes of vessels. I have been master of steam vessels; 8 seasons on tugs. I have had some experience in wrecking. Some seasons I would go and sometimes I do not go at all. Some seasons we do not have many disasters. In my employment as master of tug I have had experience, more or less, every year in the wrecking business; some years more than others. I was master in October and November, 1883, of the tug Bazile. I know the Enterprise. The tug Bazile belonged to the Detroit Tug and Transit Co. In 1883 S. A. Murphy was the manager of that line. We started with that tug to the aid of the Enterprise from Southampton. I do not remember the day we started. I could not name the day or date. We had three steam-
111 pumps and two or three lines; I could not exactly name how many. Mr. Carbry and his son were in charge of one of those steam-pumps, I believe. Sargent had the other and Jones had the other. We started from Southampton, having *having* those three pumps aboard, somewhere before dinner I think it was; I could not be sure. It was generally known whereabouts the boat was going.

Objection overruled.

I could not say the day Carbry came aboard. They were working on the Manitoba when I came there, and he pulled his pump aboard

one night and I think the next day he left. Carbry had never been out on wrecking expeditions with me before; I had never seen him before to know him. I had heard of him, but never but slightly, until he came aboard. We arrived at the wreck of the Enterprise on Tuesday, I think. There was nothing done on that day, more than we went off there and blew our whistles so they would come out and tell us the shape she was in. The boat came out; Mr. Lyon was one of those who came in the boat. They came out in the yawl-boat belonging to the Enterprise; it was the same boat that was brought down on the Enterprise. I could not say how many there were in the boat; I could not name the number. There was no such sea when she went down as there was that time. We went from there to Cockburn island to see if we could find a lighter and so on; from there we fetched up at Detour, stayed there over night, and the next day we got a lighter, and got back to the Enterprise just before dark Wednesday night. We first made a start to work on the Enterprise with a lighter before daylight on Thursday morning. We put a pump aboard the lighter that night. It was Wednesday morning they started to the wreck with the *fame*, if I remember right.

They came back about noon on Wednesday, after hav-
112 ing taken the lighter over for another pump. They left us and went over there, and it was put aboard. I saw it there, and when I went around, myself. The Bazile got around there after dinner some time; I could not name the hour. There was on my boat at that time the crew, although there might have been some of them on the wreck. I think the Carbry pump was the first pump sent aboard. Mr. Carbry and son went with that pump. I suppose Carbry and his son assisted in putting it up. I was not there; I could not say where Delaney was. I did not examine the condition of the Carbry pump, but as far as I knew it was all right. I did not see any whistle on that pump, but *they* might have been one on. There was *an* steam-gauge put upon the pump when I left. It was put on by Mr. Carbry. Mr. Delaney and some of them said the-did not feel inclined to put one on, and they were talking about such things, and I went over and advised Carbry that he had better do so, had better put one on, and that was done afterwards. When I went to the tug, you see, I did not go close to them so as to say who was at work there exactly. I went off and let go of my anchor, and I went aboard my boat. I saw the pumps there, and Carbry was there and Mr. Delaney; I suppose they left me to go there. This was on Wednesday. We got a line to her from the tug that day som-wheres about dark. At that time she had been pumped out as far as they could get the water out of her by reason of the goods and stuff that was in her. There were beans and barrels bu-sted, and I suppose from what they tole me they bothered the pumps some. The Carbry pump was placed in the port-alley alongside of the boiler. It would be on the left-hand side of the boat, on the after side, on the hind end. The ot-er pump was in the after hatch. The pump and boiler stood on the starboard side of the hatch. I think those pumps were worked before the tug pulled on her.

113 I commenced to pull at dark, and we pulled on her as hard

as we ordinarily pull on a tow. The wind shifted during the night, and came in off the lake, which raised a sea, and of course that is the time to pull a boat off, and when she would raise I would pull. There was not very much sea until the next morning at daylight, when the sea increased so she came off about 10 o'clock. I made a note of it in the log. I have not got the log here; it is at the office. We then took her right around under the lea of the island. I went aboard of her. After we got the line shortened we took her up so close to us that we could walk from one boat to the other. I suppose everybody went aboard of her. I saw Mr. Reardon there, and I saw Mr. Delaney there; I saw Carbry there. In went into the hold; when I got down there I saw some of my crew and some of the boat's crew, but Delaney and the boatmen did the most of the work in getting the goods across the island; the mate of the Enterprise was helping to do this. Delaney and the pumpmen were working to keep the pumps clear most of the time; they were working mostly in the after end of the boat, in the hold. I made an examination myself of the hold, of what I could see. I went aboard when the steam-pump men were there. She had quite a little cargo amidships, between the hatches; you would have to stoop down to get through, and you would have to crawl over it. There were barrels, and I could see beans, where they had busted open. There was some pork, and I saw some iron in the after hatch, where they dug down to the skin, and I also saw some oats. The iron lay on the lumber boards, and there was pork and beans, dried apples, and stuff like that; it was stowed as close as it could be stowed. The water had the effect upon it to swell the beans. The beans had swelled until the bu-sted the ends of the barrels out, and they
114 collected around the strainer, and we hoisted the barrels out and threw them over the side, and what worked through the strainers was pumped out over the side. I do not know how long I remained aboard the Enterprise; I would probably be aboard the biggest part of the —, off and on; I had nothing else to do.

Q. State what effect on the limber boards this stuff did have.

A. The weight was on there; it would hold down whatever the weight of them was. I do not think it would be possible for the limber boards to raise, from the situation I saw them in there. I did not take hold of the work being done there myself or made suggestions about it, any more than direct the boys around. If I saw anything I thought would be for the benefit of the boat I advised them. If there were men there I set them at work. That is what I attend to; that is what I consider I am paid for. I do not know how long we worked at her that night. I was not there much after supper, but one pumpman had to stand watch to keep the water out of her. As to the height of the water when I was there directing the boys I could not say exactly. I did not see the after — pump much; it was considerable of a job to get in there. It was full of boxes, goods, and things, and the men would have to probe through a small hole; but the pump in the main hatch was set down in there, and after they had dug the beans out of the way it got to work. I am now speaking of the Quinn pump. The vesse-

had a kee-son, I should think, of 1- inches—I do not know, I did not measure it—and the water would be over that, and sometimes higher. Sometimes the pump would stop on account of getting clogged and the water would raise, and then they would get it clear again; then it would go down. After we took this boat around the island they had two pumps working on her, and when one was working the other was mostly still on account of
115 fixing it and getting it in trim. It did not require more than one pump to keep the water out of her; one pump would keep it out.

Q. When you were around there giving suggestions did you examine the vessel, her side, &c.?

A. Yes, sir. I do not think I got in a boat exactly and went around her, but I was inside. I did not see any breaks in her anywheres—nothing more than the water where it would come through. The water appeared to come through from the starboard side forward, on the right-hand side. The goods at that place were pulled out, but I do not know in particular what was done. The main thing I remember doing was to get these oats away, so the water could get to the pump. The oats swelled up tight, and the water could hardly get through. The oats lay right on top of the barrels from aft forward. The effect from moving them was that the water came freer to the pump. As far as I could see, there was no more water flowing than one pump took care of. I could not say how long the work was prosecuted that night, but I do not think there was much done in regard to it, only to keep the water out of her until the next morning. There might have been, but I do not remember now. When I left Mr. Delaney was in charge, and seemed to be — principal man around there. He was an old, experienced man, and we listened to his advice; I did, as far as that is concerned—I listened to him. He had charge of the work of preparing this vessel to come to Detroit. I have known him by name ever since I have been in the tug business. His business is engineer of a steam-pump, and engineer also. He was accustomed to go to wrecks. I think Delaney worked as long as anybody that night, unless it would be Carbry, to keep the water out. I suppose he stood watch and watch, him and his boy. That is what they were for. I went
116 aboard the Bazile myself. I returned to the Enterprise again some time the next morning; I would not say as to the hour. I directed things around and took notice of what I could see around there. I made no further examination of the Enterprise, any more than we could not see clear to the floor because the goods were in there; I noticed that. I examined her sides, but I did not see any defect in her sides. There was no defect in her bottom that I could see. I did not see any defect in her sheat-ing. When we shortened up that line she would be on one side and the other, as her sides seemed to be all right. No oakum seemed to be worked out of the butts or anything of that kind. I do not remember going in a boat myself and going around her, any more than I would get into the boat to go ashore. I could not say whether there was any exami-

nation made of her hull or not; I do not know. The next thing to do was to get those beans and stuff—refuse—away from the pump, so the strainer would not get clogged up. I was there to see the work was kept going, and I directed it whenever I was around there. I considered the wreck was not as bad as many others that came down before; I suppose it was all right. It was ten o'clock on Thursday we got her off, and we put in that afternoon, the next day, Friday, and Saturday until night. Saturday afternoon was principally spent in cleaning up, as I considered it. The men were getting the canvas around the pumps so as to make themselves comfortable, and we had got things along as in good shape as we could under the circumstances. I took part in getting the jacket under. I have not had such an awful sight of experience in that kind of work, but I have had some. That work was supervised by Captain Reardon and myself. We were both there when the sail was got under. There was nothing lead me to think there
117 was any rocks, because there were no boulders that I saw. I was there on Wednesday pretty near the boat to see the bottom, and I did not see anything there that looked as if it would stick into the boat. The weather at this time was clear. I could probably see down by the vessel's side at this time maybe as far as 6 or 8 feet; I could see the hull of the vessel that far. I could not see any break in it as far as I could see. I think if there was a rock of any size we would have noticed it by the effect it would have on the sail. I was there more than anywhere else. They had a rope on the jacket, and they pulled it as tight as they could get it. The boat had a wale, and under that the battens were nailed down as far as they could go down. I do not know exactly how close the ropes were put on to hold the jacket in place. Of course there should be a rope that would be on the edge of the sail; then there was another big line. We had everything done before dark that could be done, as far as I knew anything about it, on the jacket and such like—before dark Saturday night.

Q. You may state whether, in your judgment, the vessel was properly and securely jacketed before the trip you proposed to make with her.

A. As far as my judgment goes I think she was; we didn't leave Saturday night with her because we did not like the appearance of the weather.

Q. Was there any understanding with reference to when you would start with the Enterprise, and for what place?

A. I was on the Bazile, but of course I cannot tell. I can't say my deck hands knew. I am certain Jones, the steam-pump engineer on the Enterprise, knew we were going to go. I do not know whether Carbry understood it. I was not having any talk with Carbry in regard to it, any more than we put this steam-gauge on; that was the most talk I had with Carbry. I advised him to put it on. I said, You can't do any such thing. I said, We are going down with this boat, and you want to know. I says,
118 An accident may happen, and we want to know to a pound what you have got; that was my idea. I did not say any-

thing about carrying high steam, any more than to say see what steam he had. Others was complaining that the pump was working with too much water in the boiler because he had no steam-gauge on there. I said something to him about the necessity of working the pump at its full capacity. When I advised him about the steam-gauge I done it with the precaution it would be necessary to have it. I knew it was late in the year. It required care, and we had to have everything in good shape. I felt that way. This was stated to Carbry by me; that is the only time I remember *calling* crawling in back where his pump was. We started at 4 o'clock Sunday morning. At that time the weather was fine. We then pulled over towards Middle island, to the highest land. I had charge of the boat when we started out. We continued to hold the weather fine all the way across. As we went along I looked to our tow occasionally, and when I looked back I only saw, during the time I was up through the day, one of the steam-pumps working on the vessel. My watch continued up to 12 o'clock, when I was succeeded by Mr. Conroy; Captain Reardon was up himself in the afternoon. Mr. Conroy was my mate. We steered across for Middle island somewheres about S. S. W.; somewheres along there. I do not remember the exact point; it was an reasonably fine day. We came right down around the island and steered up for Sturgeon Point, and when I got up at 4 o'clock in the afternoon we were off there three or four miles. We held that course until we got away below Tawas, around up toward the Chaties, that way. We then laid a straight wake from there to Port Austin. My watch was always considered off at 12 o'clock, but I did not lay down until somewheres near one, I think. At that time we were a little
119 above Port Austin light, when I went into my room. In the fore part of the night, during my watch, from 6 to 12, I was mostly behind the smoke-stack, walking backwards and forwards, going forward occasionally. I paid attention to the Enterprise. About six o'clock, after supper—it was after dark—I saw the second pump start. The way I knew it was started was by seeing the sparks. I- continued a little ways like that and then died out again; I could not see the sparks. I did not hear any signals from the steam-pumps, not one until Captain Reardon called me. I could not have heard it. The wind blew from us to them, and, of course, the whistle on Quinn's pump was a small concern, no larger than that, I should think (illustrating). There was with me during my watch that evening the watchman—of course he mostly stood forward—and the wheelsman. I think Captain Reardon got up about 11 o'clock and joined me on the deck. I kept walking back and forth. I saw the Enterprise every time we would turn round; could not help but see her. I can't remember after Captain Reardon joined me of seeing the pump working hard. I did not see any sparks. After walking awhile with Captain Reardon I laid down. About 1 o'clock I was called by Captain Reardon. I did not undress when I laid down. I think I laid down with my clothes on. He called me and told me they were blowing the whistle on the Enterprise and something was the matter. I jumped out immedi-

ately and took charge of the boat at once. Captain Reardon says: "Back, back, back her up, for God's sake." I says, It will never do in the world; if we do we will get the line in the wheel, and I told the mate to cut the line, and I checked her down, because to get the wheel over when we are running smart, one man can't get the wheel over, and Captain Reardon then jumped in to assist the man at the wheel, and the mate cut the line at this time.

120 It did not seem to me to be over five minutes from the time I came out of my room until we were among the men. In the meantime while we were getting to the Enterprise the mate and the wheelmans off watch were called, and they were working there getting down the boat while we were on the way round. The men who got into the boat were Mr. Maitland, Mr. Conroy, and I do not know who was in the boat with him then. The only — I knew was when they came back for certain. I do not know how many oars they had with yawl on the Enterprise. I do not know whether any of the oars from the Bazile were on the Enterprise. I could not say. I suppose we got turned around. I did not go and look back, because I stood right forward of the pilot-house. I suppose when we came around on the circle we would see the boat. I did not suppose she had sunk so quick. When we got around, or nearly so, we did not see nothing, and we blew the whistle. Ca-*ia*tn Reardon blew it when I first came up, but we blew it again, and we were right in among them. By the noise and hollering they made I knew we were where the Enterprise was, and I also knew it was by the compass and the P*ro*-Austin light Captain Reardon b-owed in answer to their signal. There was no sea to amount to anything. The yawl aboard the Enterprise was large enough, if they had kept the water out of her, to float all the crew, I should think. I think there were seven or eight got aboard the tug; I cannot remember which. I was up on deck; I could not tell how long it was before he died after he was taken aboard. Captain Reardon was down there assisting the men. I have known Captain Reardon for some time.

Q. Do you know what his competency is as a*n* marine inspector and wrecker?

A. I always considered him as a competent man. I should certainly call him one.

121 Q. You saw the hawser from the Enterprise to the Bazile?

A. I do not know as I did; I ran out of my room; that was the other way. I know that we still had her in tow when I came out on deck. I suppose the mate cutting the hawser was what parted it. I told him to cut it. I knew the hawser was gone afterwards by the way the boat started. I did not feel that effect before I took charge of the boat. I did not feel the hawser had parted before that. The wind at this time when she went down must have been somewheres near the southwest. That would be after us on the starboard qua-ter, taking into consideration the course we were on.

Q. Up to the time you laid down that night, at one o'clock, did you notice anything or have any reasons to apprehend there was any-

thing in the condition of the Enterprise that would cause apprehension for her safety?

A. Nothing.

Q. Was there anything at any time during the day after you started for Green island up to the time of her sinking that in your judgment and experience would require you to communicate with them?

A. No, sir.

Q. Did you see any of the crew of the Enterprise during the day?

A. I laid down at dinner time, and of course in the afternoon I got up about four o'clock. It had begun to get dark, and I could see the men walking around from that time till the time it got to- dark.

Q. Is there any custom of sending divers on an expedition of that sort?

A. Sometimes they take them; sometimes they do not. They take them when they are ordered.

122 Cross-examination by Mr. DICKINSON:

I heard distinctly the hollering when the Enterprise went down. When we got around to them we were headed down, so when we got around I saw nothing where I supposed I ought to see them; then we blew our whistle. We heard them hollering. It was about the time we got headed to where I — the wreck would be, where she had been.

Q. How much space did you take to round to there, about?

A. I could not tell you any nigher than about, maybe, two-thirds of the width of the river between Windsor and Detroit: and when we were headed towards the wreck I heard the hollering, when we blew the whistle.

Q. Can a man engaged upon a tug wind in the lines as fast or fast enough to take in the slack when you back up?

A. No, sir; not and keep the boat backing. Many a time you have got to go ahead or else you will run over the line. I saw Joyn Carbry first at South Hampton. He was running a steam-pump on the Manitoba wreck. Captain Reardon got word to go there, to Green island. I went there, as he had charge of the boat as far as going where he wanted it to go, in regard to going to the wreck. I went to Green island by Captain Reardon's directions. The pumps were taken from the Manitoba and put aboard of her. We passed Presque Isle. I was on watch. It is a harbor. I came to go to work that night because the weather pleased me. Nobody gave me directions to go out that night. I went because I made up my mind that it was a good time to start. Nobody objected, and I went. The conversation I had with Reardon was before supper. I told the watchman to call me at 12 o'clock; I says if the weather was fine outside; but I could he-re a surf, and I concluded we had
123 better not go, and I told him to call me at 3 o'clock. Captain Reardon got up mostly when I did, because we had to sleep in one bed. I did not see Jones that day—that day I started. I saw him the day before I started. I told him we were going to

start certainly if the weather would permit—if we got the boat ready. Jones said nothing that I know of, except it was all right. He was helping with the rest of us to get ready. Jones was drowned. I can't remember telling any more else than the watchman about calling me—the watchman on the Bazile. It was his business to keep watch and to call me when I wanted him to. Middle island is about 15 miles above Thunder bay. We struck across from Presque Isle; that would be the way. We passed three harbors before the accident—Presque Isle, Alpena, and Tawas. When we started out from Green island we made right across the lake to the Michigan side, to Middle island.

Redirect:

We got from Presque Isle, probably, about 15 miles. The weather was so nice that it was just as smooth coming across as ever, and the consequence was after daylight I made a straight wake — as to make quick time while the weather was good. The length of line we had out was somewhere in the neighborhood of between three or four hundred — when we started. I regulated that. That night when the pump started I struck out some more. As a precaution I thought it would be easier on the boat. I regulated that line — the Enterprise. She went to the bottom a total loss. Mr. Murphy paid me. Mr. Murphy sent me from here with two steam-pumps and two engineers and helpers to go to the Iowa. It is customary to do that when a wrecking outfit is sent for, to supply the steam-pump, the tug, the engineers, and all hands. This is the same outfit we had at the Iowa, with the exception of the Carbry pump. The Carbry pump we got at South Hampton.

124 Q. Did you note how much of a cargo was left on the limber boards of the Enterprise?

A. I have no way of determining how much. I think it was sufficient to hold the limber boards down. With the cargo, such of — as was of no use, was thrown over the side of the boat.

Recross:

I have no way of telling how much pressure there would be on the limber boards. I have not any idea how much pressure to the square foot there would be on the limber boards of the Enterprise when she went out into the lake.

COURT: I have received the testimony of Captain Ward upon the subject of these defendants doing business together and am prepared to dispose of the motion that was made at the close of the plaintiff's case for a verdict in favor of the three companys, the Thames & Mersey, the Union, and the State of Pennsylvania.

CHARLES CONROY sworn on behalf of the defendants:

I was on the tug Bazile in the capacity of mate. I had sailed 18 seasons then. It was in the afternoon when we reached the Enterprise. The mate and two men, they came out with their yawl-boat from the Enterprise. There was a pretty good sea on. I think

there was a little more sea then at the time the Enterprise went down. It was blowing harder. I assisted in the work of putting the steam-pumps aboard the Enterprise. I went aboard the
125 Enterprise and into her hold. I made an examination of her condition and assisted in the work of preparing to cross the lake; worked in her all the time she was there. I have had some experience in wrecks and wrecking expeditions. There was a lot of freight in her when I went to work. A part of it was taken out and thrown overboard. I went over with the steam-pumps. I did not remain with them until they had her pumped out. I was going from the beach to the tug, backwards and forwards. I did not see any break in her hull when I went below, after she was pumped out. When I commenced to work there was in the hold about two feet of water over the freight. After taking her off we took her around to the north shore of the island. I think it was after we had thrown the oats out I saw the two feet of water that was there before we got her pumped out. When the tug took her around to the other side of the island the pumps sucked. There wasn't water enough in her to furnish the pumps. I was working in her hull. I saw no break in her sheat-ing nor anything in her ceiling to indicate there was a break in her outside planking. I went outside of her with a part of the crew. We put the jackets around her. I made an inspection of her hull outside, going around the boat with some of the crew. Captain Reardon had charge of the work after they had got her pumped out. Delaney was there. Capt. Reardon was there all the while—that is, when we were on the island or carrying the freight across. I don't know who had charge when we were carrying the freight across. I was with Captain Reardon on the island. Her seams looked all right to me. I saw no break at all in the boat. There was quite a bit of freight left in her hull—barrels, sacks, and boxes. I did not notice any steel there, or iron. I did not see her limber boards. They were covered with freight. They said there was pork in the barrels. I did not handle any of them myself. From what I
126 saw of it I should say it was heavy freight. I think we were there three days in all fixing her up. I assisted in the work of jacketing the vessel. Capt. Hutchinson, Capt. Reardon, and the crew of the tug and the crew of the barge took part in that. Two jackets were put on her. The jackets are put around the hull of the boat and along the sides and as far down as we can reach. They were battened on with inch pieces. Some of them were two and three inches wide—the battens—and we put them on as far as we could get with reference to the valve; well, that is where they were nailed, right close up to the valve—the battens. In doing that work of jacketing the vessel I had an opportunity in seeing whether the oakum had started from the seams, but I saw no indications of it. I should think there was sufficient left on the limber boards to withstand the pressure of the water if the vessel should spring aleak seriously. I had no idea of the weight put on those limber boards. I think they were sufficient to hold them down. I saw nothing which would indicate she had any rock in her bottom. I think I would be able to know it, even without a diver, if such be the case.

The jacketing would not have come up straight; it would bag down; it would draw in one place more than in another. I was on the vessel after we got her around on that side of the island. One pump was used to keep her free. We had everything straightened out the day before we left. The capt. would not leave on account of the weather—Captain Hutchinson. I think it was generally known when the boat was going to start. We had fine weather. I was in bed when they got across the lake, and I was on watch at the time the Enterprise sunk. Mine is second watch, from 12 to 6. I was not on watch that night, only from 12 to 6. I heard no signals
127 from the Enterprise while on watch between six and twelve. I saw the crew walking around. Jones waved his hat or handkerchief at me; that is all. I saw nothing at that time until just before the sinking of the Enterprise to cause me any alarm of its condition. Mr. Carbey's pump was on the prort side, aft, in the alley. Jones and Quinn's pump was on the starboard side, amidships, in the midship hatch. There was canvas upon it or a jacket over the boiler, over Jones'; it was right in the alley. The jacket projected over it. Quinn's pump was the pump covered by canvas. Quinn's pump had the whistle. The first I heard from the Enterprise on the way down was a little after two o'clock in the morning she went. As soon as they blowed their whistle Capt. Reardon called Capt. Hutchinson. We were walking up and down on deck on the port side. We had a fair view of the Enterprise; seen her every time we would turn aroun- to walk aft of the pilot-house.

Q. Did you see anything to indicate that both pumps —?

A. No, sir; I could not see only the one pump working on the Enterprise. I was with Capt. Reardon when I heard its first whistle. Capt. Reardon started to call Capt. Hutchinson, and when I was going by the -ilot-house I gave the whistle three short toots and went and called the wheelsman and deckhands. Capt. Hutchinson came out right away. I saw him when I came up the steps again. He took charge of the vessel. The first order I got from Capt. Hutchinson was to cut the line.

Q. Did you cut the line?

A. I cut it. I did not notice whether it had parted; before that time it had not parted. Then I went to the yawl-boat and we got that over. The boat was coming around on a port wheel. Capt. Hutchinson was forward in charge of the boat then. I got into the yawl with the second engineer and wheelsman. I could not say how soon after I heard the first whistles the boat was turned
128 around and got to the wreckage floating from the Enterprise. We had the boat down before she got around and stopped. There was no delay in the turning around the Bazil. We assisted five or six to get out of the water. I saw Carbry. I don't know exactly who got hold of him. I was in the stern. We were working the yawl with one oar sculling her. There wasn't no big sea; it was kind of chopped up. We did not have much difficulty in handling the yawl. We got the men out by the side of the yawl. My crew would have to be on one side to pull the men out. That would tip the boat some. I helped get Carbry out. He was taken

aboard the tug. Everybody that was on board the tug that was down below helped to care for those from the Enterprise. Carbry was brought aboard the tug alive.

JAMES M. SARGENT sworn.

Examined by Mr. CANFIELD:

I reside in Detroit. My business is engineer. That steam-pump that I was with on that wreck was the first one I was ever with. I was at the Enterprise with J. P. Clock's pump. Linn took that pump. Capt. Stewart, who went up with that pump, he is the clerk or boss for Murphy, I believe. I went up as a part of the wrecking outfit of the Bazile. I was on board the Enterprise. I saw Carbry aboard of her. I went through the hole of the vessel pretty well. The rock on which she lay looked to me to be flat. I did not go to the outside of the vessel. I assisted Delaney around the pumps; helped to put them up and helped to get the coal out of the fire-hold, and helped to shore them down to the deck. I was aboard of her after she was gotten off the rocks. I think everybody knew she was going to Detroit or Port Huron. I had a little talk with Carbry about that.

Q. Will you state just what was spoke of and what was said between you and Carbry in regard to bringing the vessel away?

Objected to. Objection overruled. Exception.

129 I told Carbry that day he had best go and take a good sleep and he would not get any before we got to Detroit, and he went aboasd the tug Bazile at dinner time. I had him clean all the *flews* in his boiler and get her al- ready, so he would not have any trouble and put a steam-gauge on her. I could not tell you the day of the week. It was the day before we left Detroit. I talked with him about putting a steam-gauge on before that time. Everybody else, as well as me, talked with him about the steam-gauge. I told him he had best go and get some sleep, for he would not get any more before he got to Detroit or Port Huron, and he went. In the meantime I think he went and cleaned the flues to his boilers and put a steam-gauge on. The Enterprise was lying leng*ht*wise of the tug Bazile, at that time under the lee of the island Carbry's pump was running while she lay there. I cleaned out the flues of his pump and put on the steam-gauge. I couldn't say exactly how long it took. I worked as fast as I could; might have been half an hour; might have been a little more. During that time no other steam-pump was running, to my knowledge. The water during that half hour, by the time we got the flues cleaned out and the steam-gauge on, rose up very high; good height in the fire-hold. I didn't go down to see. I could not say how long it took us to get the tug started after we got the flues cleaned and the steam-gauge on. The water was worm in the boiler; it wouldn't take very long. It could be done in ten minutes; maybe more; maybe less. I suppose that pump freed the vessel again from the water in about an half an hour; it might be more. I continued that Carbry's steam-

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129 I told Carbry that day he had best go and take a good sleep and he would not get any before we got to Detroit, and he went aboasd the tug Bazile at dinner time. I had him clean all the *flews* in his boiler and get her al- ready, so he would not have any trouble and put a steam-gauge on her. I could not tell you the day of the week. It was the day before we left Detroit. I talked with him about putting a steam-gauge on before that time. Everybody else, as well as me, talked with him about the steam-gauge. I told him he had best go and get some sleep, for he would not get any more before he got to Detroit or Port Huron, and he went. In the meantime I think he went and cleaned the flues to his boilers and put a steam-gauge on. The Enterprise was lying lengh*t*wise of the tug Bazile, at that time under the lee of the island Carbry's pump was running while she lay there. I cleaned out the flues of his pump and put on the steam-gauge. I couldn't say exactly how long it took. I worked as fast as I could; might have been half an hour; might have been a little more. During that time no other steam-pump was running, to my knowledge. The water during that half hour, by the time we got the flues cleaned out and the steam-gauge on, rose up very high; good height in the fire-hold. I didn't go down to see. I could not say how long it took us to get the tug started after we got the flues cleaned and the steam-gauge on. The water was worm in the boiler; it wouldn't take very long. It could be done in ten minutes; maybe more; maybe less. I suppose that pump freed the vessel again from the water in about an half an hour; it might be more. I continued that Carbry's steam-

pump that day till supper time. It might have been two hours after I got it fixed. I should judge it was about four o'clock when I done that. It threw water all the time. Carbry came back at supper time to his pump from his sleep.
130 When I said to Carbry that he had better go and get a sleep, for it would be the only chance he would have until he got to Detroit, he went off. He didn't make much of a reply. He went away. He said all right or something to that effect. I do not recollect what was said when he came back there to the pump. I knew John J. Carbry, I think that was his name, the son of John Carbry. Yes, sir; I talked with him about this matter. Nobody was present when I had the talk. The crew of the Enterprise, as I understood, was ashore on the island when I got up there. They came aboard the day before we started home—I can't say what time—with the exception of a few, I believe, who went in a tug. The weather was favorable. I did not hear Carbry make any objections to coming down on the Enterprise. I did not take any notice as I came down what was going on on the barge or the way the barge followed the tug. At two o'clock Monday morning there was not much wind; pretty cold. About 6 o'clock Sunday evening I was aboard the tug. I was not doing anything in particular; down around the engine-room most of the time. I did not hear any signals—whistles from the barge—about that time.

Cross-examination:

Captain Reardon was in charge of this expedition. I was connected with the pumps as engineer. My pump was aboard the Bazile all the time. The business that I had on the Enterprise was to help put the pumps up. At the time Carbry was asleep I was cleaning the pumps. It did not take me very long to clean the flues. It might take about ten or fifteen minutes.

Q. Can you clean out the flues with 60 pounds of steam on and the pumps running?

131 A. I don't know. I never tried. That was the first pump I was ever with. Still I cleaned the flues out; couldn't say for that how rapidly; it came out pretty fast. It was known to the men, all that was around there, about starting. When I was not in bed the most of my time that I was up and about was spent in the engine-room. There was some noise around the engine. I did not notice the iron sheat-ing upon the Enterprise. I think she had iron sheat-ing; I am not sure. I didn't examine it or look at it. I didn't examine any side of the Enterprise, only just as I see it pass. I didn't make any particular examination.

Redirect:

I think I first met Capt. Reardon in South Hampton. Captain Hutchinson was in charge of the expedition when it left here. Capt. Hutchinson did not, to my knowledge, give up having charge. I was given the order about assisting to take the pumps on the Enterprise through Mr. Delaney. It was my business. I took my orders

from him. When I saw Captain Reardon was in charge of the expedition—I mean this, that he was up there as a wrecking master or what is known as a wrecking master. I don't know as Capt. Reardon gave me any orders in particular, any more than he would suggest something to be done.

Q. Did you hear him give any orders to any one connected with the pumps other than you?

A. Yes, sir; Mr. Delaney mostly he talked to.

Q. I say so far as the orders that he gave were concerned. Did you hear him give any directions to the men working on the pumps?

A. No, sir; I didn't. Before cleaning the flues I let the fires go down. It was necessary for me to start up the fires after I got the flues cleaned and the steam-gauge on. I couldn't put the
132 steam-gauge on with the steam on. The other two engineers with the other two pumps were there at the time. Whether there were men at work in the hold I couldn't say. I don't think they were doing much in the hold. I think the crew of the Enterprise were on the ssland; hadn't come aboard yet.

Recross:

We did not have a diver on that expedition. Mr. Kane was there. He was helper for his brother's pump. He had not been with this steam-wrecking expedition before. I let the fires go down for that purpose of putting the steam-gauge on.

MARTIN DELANEY sworn for defendant:

I reside 267 First street, Detroit, Mich. I have lived in Detroit about 28 years. My business is engineer and boiler-making; that is my trade. I have — something to do with the use of steam-pumps off and on for 27 or 28 years. I was out almost continuously in the wrecking business until about six years ago; been engineer off and on during the summer months; in the fall on wrecking vessels. The last six years I have done not much of anything else only what I did last winter; 12 or 14 years that I was at pretty much all the time. I could not say the number of vessels I have worked upon. I have worked all around the lakes from Port Colborne to Chicago. I was up at the Enterprise. We started from South Hampton to look for another vessel, and then went to the Enterprise. When we started to go away from here we started to go to a vessel by the name of Iowa. We run into South Hampton, and from there we went up. We didn't go there to this barge; there was some other vessel we were looking for, I think. We were working on a barge this side of there, and then we went from there to the Enterprise.

J. P. Clark owned the pump I went with. Well, Mr. Clark
133 hired the *the* pump to Murphy. I was working for John P. Clark at that time, and he got me to go with the pump, and Murphy paid me for it. Clark paid me for my services; Murphy paid me for some little overtime. I went from here on the Bazile, Capt. Hutchinson commanding the Bazile. I helped to get their pumps aboard the Enterprise, and went to work and got in good shape to come down, and Reardon was busy and he wanted me to

go there and get everything in good shape to come home. When I went aboard the vessel I lo*kk*ed at her decks, and saw here decks looked all right, and I went over her port side and couldn't see anything wrong with her. There was one place in the vessel I thought was a plac- that was started in her covering-board; probably open $\frac{3}{16}$th of an inch. That was the only place I could see started any. That was right on the covering-board; right on the main deck. I was aboard of her all the time pretty much except when I went to my meals. They pumped her right out without any trouble. I don't think a vessel like her it would take over an hour to pump that much water out of a vessel if there was no freight in her.

Q. Will you tell us what is the capacity of your own pump for the purpose of throwing the water out of the Enterprise?

A. The manufacture-s claim that they will throw 65 barrels per minute, 36 gallons to the barrel. That would be 2,160 gallons per minute—that is, the two, taking off five barrels of their estimate—the two pumps together. The rock the Enterprise laid on appeared to be solid rock all around right around there. She laid upon the shore. This one place appeared to be comparatively level, with the exception of one place that appeared to be pretty high. I saw no boulders in where she was. It is all solid rock about the island as far as I could see, all around there. I staïd aboard of her until they got her off;
134 that was pretty late, until about 9 o'clock. I left there Sunday about one o'clock in the morning. I don't think the pump was running very steady. I don't recollect whether there was water enough to keep it running all the time or not. There was very little water leaking into her. You could stop the pumps and pump easy and pump her out in about half an hour afterwards. She was leaking very little. There was a great deal of loose stuff in the hold, and when we put up this other pump we cleaned out the hold. There was nothing left in the hold but beans and peas, and we pumped them overboard. The limber boards along there, as far as I could see, was fastened with iron—a bar on each side. I didn't see on that side. They told me it was the same on both sides; and then there was freight in her—boxes and barrels set in t*ei*rs right across the deck. I· didn't seem possible *for* me for those lumber boards to have been lifted or taken up if there had been freight upon them that was all water soaked, swelled up tight, and solid. In my opinion, they were fastened or held down by t*y*e weight that was upon them. That is the only time I ever recollect of a vessel being shored down. I should say they were securely held down from the experience I have had in regard to fetching down vessels that were flying light, without canvas. I examined the vessel for the purpose of ascertaining what her condition was in v*iew* of bringing her away from there. That is what I went aboard for, to get her ready to come down. I examined her all around. I didn't think at that time there was any trouble at all about coming to the river, not at all. There were two pumps on her and she was leaking a very little. I saw the iron around her bows.

Q. It was testified to here yesterday or the day before that the

rivets and spikes that held that iron sheat-ing were drawn
135 out. Tell us whether that is so or not.

A. I don't recollect of seeing any. There might have been some nails out of it. There was not that I could see.

Q. Will you state whether you made an examination as to satisfy you in regard to the sheat-ing?

A. That was my impression at the time, as far as I could see. The inside, of course, I could not see much of, for the reason it was covered with freight outside the vessel. I could not see no fault about bringing her down at all except on those places where I have mentioned.

Q. Take any vessel that can be kept free of water by a single pump from Thursday morning till Sunday morning lying in still water, and then from Sunday morning until Monday morning—until Sunday night—would you suppose it would be imprudent to bring such a vessel across the lake in the condition the weather was at that time?

A. I would not, for the reason I have brought a good many vessels — worse shape than she was with a single pump.

Q. You were aboard the tug coming down?

A. I was aboard the tug coming down. I did not intend coming down on the Enterprise. The way that came to be changed was at the supper table Mr. Reardon says to me, he says, Delaney, we have a pretty bad gale, and he says, I wish you would go down and take charge of that barge. I told him I would, and went over after supper aboard the barge. I told the captain of the barge I was coming down with him, and I told him what I wanted to do. That is all there was around the pump. There was John Kane and several of the men aboard the vessel, and he said it was all right; that he was glad I was coming down with them. I stayed aboad there until 6 o'clock, and then went aboard the tug. As I didn't think we would get away before morning, I thought I would take a sleep. I said this at the supper table. I don't remember whether I told them to wake me up or not; but I was sitting at the table when this conversation took place. Of course I understood I was going down, and Reardon understood it. Well, he says that is all right. I went in and laid down, but didn't take off my clothes; just took off my boots and overcoat, and just laid down in that way. In the morning I got up and came up and looked around and saw we were a couple of miles away from the island, towing the barge astern of us. I saw Reardon, and he says, I thought you were aboad the barge. I told him all the circumstances that took place, and he says, I guess we are going to have favorable weather and I guess she is all right. He supposed I was aboard the barge. We were both asleep. It was generally known among the men aboard the barge that we were to start with her for the rivers. Of course, that was generally understood. We were waiting for the weather; that was all. I don't know just how the weather Sunday morning was. Saturday had been blowing some. We waited for the wind to go down, and as soon as the wind went down we were going to start. I don't just recollect on Sunday how the weather was. There was not much wind, if any

at all. The Enterprise, she was coming along all right. I was on deck most of the time looking at her. There was nothing in her appearance that indicated danger or trouble—nothing at all.
136 On Sunday afternoon Capt. Reardon was walking on the deck of the tug, and she was not pumping any at all for I don't know how long. I can't tell by the sound whether a pump is throwing water or not. It makes a little different noise. This was a shut-up water-pipe—shut up to keep the water from running over the deck—and it would make a little kind of a noise. I could tell. I don't know how it would be with with other persons. I could run the pump without throwing water. At six o'clock Sunday I was aboard the tug; I can't tell where. I did not Sunday evening about six o'clock or anywhere about that time see any signals from the barge; never heard anything about it until this suit was commenced here.

Q. From their appearance, the condition of the vessel, and your experience, and from the care that was taken in getting the Enterprise ready, what do you say as to it being prudent or imprudent to attempt to bring her to the rivers?

A. I don't think it was imprudent. I thought the vessel was in good shape to come down. The vessel was making so little water, and the two pumps on her. I don't know anything about the battening. I saw them get it over the side and working at it. How it was put on or anything of that I don't know.

Cross-examination:

The sheating was on that boat came down below the water edge; it came above the water line. I didn't take much notice about that; I didn't take much notice of the sheat-ing; I didn't notice whether the sheat-ing extended around the hull; it passed below the water line aft, I know. I went in a small boat around her; I made an examination of her hull; I could not see any heavy strain on it. Right here about the covering board this streak of planking was the worst place that we could see in the vessel. I could see it without moving anything. The freight was not moved out — as to examine the bottom. When I arrived there she was lying right on the rocks. I don't know whether she went ashore in a storm or not. I think they told me there was nothing but a snow-storm. All the examination I made was on the decks and around her hold to see if the joints were started; to see how much she had sprung or strained. We had a boat on the Bazile. Reardon asked me to go aboard the Enterprise, but not after we started. During that Sunday we did not have any communication with the Enterprise. The tow-line was four or five hundred feet.

Q. Did you say on the Sunday night or the Monday morning that the loss of the Enterprise in the engine-room, in the presence of Mrs. Upson and the second engineer, Cowell, that you were glad you didn't come down on the Enterprise, because you knew she would not reach the St. Clair river?

A. I never made such a remark in my life. I was sworn before the coroner, Coroner Locke, at the inquest on the death of John

Carbry, on or about February 4th, 1884. My hearing in 1883 was just the same.

Q. Did you, on that inquest before Coroner Locke and the jury, testify that the taking of the Enterprise out of that harbor and taking her out on Lake Huron was a risky job?

137 A. Well, taking any vessel is a risky job. I swore so, I believe.

Q. Did you testify before that coroner and jury that you told Capt. Reardon that as there was no diver on board to examine the bottom it would not do to take that wreck across the lake?

A. I don't think I did. There was some conversation about that, but I don't recollect now where it was; whether it was up there or whether—let me see. I told him that it would be better if we had a diver. I never swore before the Enterprise was started across the lake I told Captain Reardon that it would not do take the wreck across the lake without having her bottom examined by a diver.

Q. Did you swear that the insurance agent was informed, meaning Captain Reardon, that the Enterprise had a terrible pounding upon the rocks?

A. I think I did.

Q. Did you ever testify before the coroner that there should have been a diver to examine the bottom of the Enterprise before moving her?

A. I don't recollect I did. I know there was some conversation or remark about a diver. I don't recollect.

Q. Did you say that, or that in substance, before the coroner under oath?

A. I don't recollect now. I did not go out in the boat to pick Carbry up. I saw him when he was brought in. I could not say exactly how long he lived; but a short time. When I helped him out of the gangway across the freight and as soon as I saw who it was we put him down, and I stepped out and unlocked my box and took out some dry clothes and went back, and Mr. Sareant and some other parties were behind him. It would not take me more than five or ten minutes, and I came in and told him of him; tried to get off his shirt, and he was very stiff, and he just

138 kind of looked up at me, and then his head dropped down in a few minutes, and the boys said he was dead. He never spoke, to my knowledge. We had a man by the name of Quinn along. He was assistan- engineer of one of the pumps. I don't know that he is a diver; he has a brother that is. I have been connected with that equipment for wrecking before. They did not have a diver very —. As a general thing, if a man gets into trouble he telegraphs what assistance he wants. If he telegraphs for a diver they send one. We did not have a diver in connection with that expedition. If he was a diver he had no rig with him. They are all divers—all the brothers. I do not know whether Quinn's business was that of a diver or not. I don't know which way the wind was blowing—from the wreck towards the tug or from the tug towards the wreck—at six o'clock Sunday. I am not posted anything about it. I believe in the morning after breakfast I asked

Capt. Hutchinson how the wind was, and he told me a little to the northward. I don't know.

Redirect:

No one was with me when I examined the Enterprise with a small boat. She was alongside, and I got into her and sculled around myself. I don't recollect of anybody being there.

MARTIN DELANEY recalled:

Mr. DICKINSON: Is that your signature (handing a paper to witness)?

—. I think it is. I am not sure, though. My testimony, I think, was read over to you at the coroner's inquest. I don't know.

WALTER R. MAITLAND sworn on behalf of defendant:

I live at Brighton, Ontario. My business is sailor. I have sailed this fifteen seasons the last season passed. In the fall
139 of 1883, a yaer ago, I was on the Bazile. Wheeling I was at the barge Enterprise. After I got up there the first thing I done was to help put the steam-pumps aboard of her; after that we went to lightering her off, taking the cargo out of her. I am not sure whether it was Captain Hutchinson or the mate that gave me orders—the mate of the Bazile. I was in the hold of the Enterprise. I didn't see nothing; anyway she was wrecked—anyway very bad. I didn't see any seams nor any oakum out of her. I saw the iron sheat-ing. I didn't see none of the spikes or nails were drawn out. I helped jacket the Enterprise; canvas put around her. There was a tackel got onto it. It was bowsed down as tight as we could get it onto the hull, and after that it was battened. There was a tackle got onto one end of the canvas, and we pulled on that throat hal-iards. We pulled that all we could, and then we battened it afterwards; that was to tighten the canvas on the hull. This canvas was doubled; there was two jackets. It was battened by inch lumber, being split from three to four inches wide and tenpenny nails put into that. Captain Reardon cautioned us to put lots of nails into the battens, close together. The jackets were securely battened, as far as my experience goes in that business. I think it was in a position to see them if you were out. I was over the side of her in a yawl. It was two wheelsmans of the steambarge that drove the nails to nail the battens on. There was a fender streak, or a wale streak, as you might call it, on the hull of the steam-barge, and these battens were put underneath the wale streak; along and on the after end they were put under the water, as she was down at the stern more than at the head; it was under the water, and we wolled ourselves up to drive the nails there.

140 Cross-examination:

There was considerable freight down in the hold when I went down there to examine her; considerable all over the bottom that was not removed in making the examination. She was battened

more than two feet to the top of the rail. On the forward end it was sheet iron. You could not drive the nails through the sheet iron. There was no canvas there on her bow; just at aft, the fore rigging, the canvas was on, just where she lay on this ridge of rocks. You could not drive the nails in the sheet iron. I should judge it was about two or three feet from the water to the iron. Th- wheelsman of the steam-barge, he drove the nails; I held the batten.

Redirect:

I did not see any evide-ce of that sheet-iron on the bow being started or being loosened.

Recross:

There was a tool chest went with the steam-pumps.

DANIEL C. STOCKTON sworn on behalf of defendant.

Examined by Mr. CANFIELD:

I reside in Detroit at present. I was one of the wheelsman of the Bazile, I beli-ve, while she was wrecking in November and December, in 1883, and was at the Enterprise. I remember coming down with the Enterprise in tow. My watch commenced at 12 o'clock midnight, from 12 to —. I was at the wheel at the time the Enterprise was taken and brought down. Well, the mate was on deck, Mr. Conroy, and Mr. Reardon. I beli*e*ve the mate was in command of the deck. The first intimation I had of any trouble from the Enterprise was that I heard the whistle blow on the
141 steam-pump boiler. I got an order to put the wheel hard-a-port. Capt. Hutchinson gave the order j-st shortly afterwards hearing the whistle from the steam-pump; as the ca-t. came out of his room. It was not over a minute, I think. The tug came around pretty fast. Mr. Reardon helped me to put the wheel over. The captain ordered it put hard-a-port, and the captain came into the pilot-house and helped me to put it over. I heard no signals from the steam-barge before these. I was in the pilot-house from 12. If that whistle had been sounded previous I should have heard it. In getting to the wreck or debris I don't think over five or six minutes was consumed. She was brought around as quickly as she could be.

No cross-examination.

MARTIN SWAIN sworn on behalf of the defendant.

Examined by Mr. CANFILED:

I have been a tug-master on about 18 years. During that time I have been engaged in wrecking off and on. I have been in the tug Winslow seven or eight years and am familiar with the business of wrecking on all the lakes. I know something of the operation of steam-pumps. I have seen the steam-barge Enterprise; that is about all I know

of her. When a wrecking expedition is called for to assist a vessel in distress we generally take them to the first port of repairs. If a vessel is bound up to Chicago and she goes ashore on the straights or on Lake Huron, they would try to take her to Manitowoc, on Lake Michigan; that would be the first place. If it was late in the fall and we thought we could not get to Lake Michigan we would come to Lake Huron, wherever we thought best. Most generally we take them to a dry dock so they can be repaired. If the steam-barge had two pumps, both in first-class order, and one of them would keep her free with half of its capacity, and there were no
142 defects that we could see,' the barge, that she was liable to fall to peices or sink in an instant, I think they used good judgment to go with her, because that one pump is left in case she springs aleak; but if they had only one pump and the boat leaked bad and no diver I would not think it was good judgment to leave; but with assistance of another pump I don't think it would be imprudent. If the captain telegraphs for an expedition to a wrecking company he telegraphs generally what he wants. If you send anything he don't ask for he won't pay for it; but if he sends for a full wrecking outfit, tells you the condition of his boat, he wants two pumps, a diver, and a hawser, you go with it. You take what you want. If you could see the boat you could exactly tell what you wanted, but you guess what you want and take it along. There are a great many boats that you go after without a diver. I suppose I have wrecked more boats without a diver than I ever did with a diver—that is, where I serach the bottom. I have had divers for the simple reason you couldn't tell by looking at the bottom how bad she was hurt. You look at the circumstances—the shelving rock, the ragged rock, whatever she goes onto. If there are any boulders—i- ain't often you will find any boulders jammed into the frames or into the plankes; but if there is boulders there and it is a dangerous-looking place you might say there is liable to be a stone in her bottom. Stone is liable to wedge in between her frame, and you have a gale of wind it will come out; sometimes it will fall out. We have had them brought in and have them picked out. The diver is of no use unless you have the boat in a position so the diver can stand or walk in a position to get at it to work at the place. You have got to get her where the water is shallow, so you will only have three or three and a half feet of water under her, so he can stand at the bottom and
143 walk all around the boat with a peice of oakum in his hand, and he will watch for the suction, and wherever it is he will put it in with his hand and pound it with a kind of hatchet. If you were in deep water and there is one little hole you can perhaps fix it, but to make a general search to find a stone in her bottom you have to have a shallow bottom where you can find it; so there is lots of times when you have all the material there, and you think it is not necessary, and you don't want to loose any time, and you hitch up your tow and take a start; that is my experience in the business. I have done the jacketing of vessels. Take a vessel where the pumps are able to free the vessel, if that vessel is jacketed with a

double canvas and the canvas is battened, I think it would be prudent to *two* her in that condition, the weather being moderate. I think it would be prudent to do so if you had the canvas there, and it wouldn't do no hurt; it would help to do good. But my experience in the jacketing business is if you don't get into any ice the jacket will help you; but wherever the canvas bags away from the vessel *and* you put ropes around five or six feet and pull them taut, and where there is no leak for the water to get into the vessel the water will bag the canvas down. As long as *tom* vessel don't lift or jump the canvas will hold, but as soon as she lifts the canvas will bust in those places, and if it is anywhere ne*qr* the leak the vessel will commence to leak faster, but without a diver or any other material it is a good preventive as you could have under the circumstances. I don't know anything more a man could do to stop a leak than to put canvas under her.

Mr. DICKINSON:

I admit that Captain Reardon was a good and competent seaman and an excellent wrecker. The trouble is he didn't act on his good judgment. If one pump was sufficient to
144 keep the Enterprise free from water and the Enterprise had been pumped out in one hour or two hours, and that one pump kept her free thereafter from Thursday morning until Sunday morning while lying in deep water, and from Sunday morning until six o'clock Sunday evening, I think there was no danger in to*bring* the Enterprise if she had one pump to spare, and with the jackets on and a strict watch was kept on the pump and I was there and knew how fast it would go in I don't think it would. It was good seamanship to go to sea with two pumps only, using one and having the other on- ready to start if necessary, keep steam on it ready to let her go. If you let the steam go down and didn't keep close track of the water, that of course would make a difference. If, under those circumstances, the vessel had been towed from Sunday morning at four o'clock all day across Lake Huron with the tug Bazile at the rate *if* six or seven miles an hour, and no trouble was exper*cien*ed on board the barge. Only one pump is working at a time, and, finally, when they get down off Port Austin light a sudden alarm is given, and before the tug, her line being cut, can be turned around the barge Enterprise sinks. My candid opinion is that a boat leaking so little, only taking one pump to keep her free, I would say that my experience with steam-pump men is that they would lie down and go to sleep by alongside of the boiler, and they haven't got caution enough to keep track of the boat to see whether she is leaking or not, and the boat is liable to be pretty full of water before they knew it. If a close and careful watch had been maintained of those pumps on board that vessel, I don't think she would have gone down in that way in which she is said to have sunk. I cane say whether she would come down all right or not. I can't say what
danger you would have to encounter. When you come with
145 a wreck you can't tell. Both pumps would keep her free under those circumstances, I think. When you go with a

wreck you can tell pretty near by the leaks of your wreck what kind of a chance you have got. You judge by the looks of your wreck as to her condition. The practical man who was on the ground would know more about it than any expert not on the ground.

Exception for plaintiff.

Cross-examination.

Mr. DICKINSON:

Q. Would you esteem it good judgment, if you learned that a wreck had been pounding upon the rock for two weeks, to start out with the wreck across Lake Huron without any examination upon the bottom, with human lives upon the wreck?

A. Well, sir, it would depend upon how much she had leaked before I left with her and what the condition of the wreck was. If I thought she was fit to go down with the material I had there I would take her. I'd use my own judgment. If there was an experienced *mad* that I thought knew anything about wrecking there I might ask him what his judgment was. If I thought he had no experience I would not ask him anything about it.

Q. Without examination would you start out?

A. I would if I thought she was fit to go. I should use all the precaution I could. Pumping her out and getting her off the rocks would have a great deal to do with it. You could tell how much she was broken up.

Redirect:

I would not attempt to tow such a barge as the Enterprise across Lake Huron at that season of the year or any other season of the year without a watch aboard her. It would be a case of gross carelessness to do that.

146 JAMES J. REARDON sworn on behalf of the defendant.

Examined by Mr. CANFIELD:

I live at Buffalo, N. Y. I have been engaged in the marine insurance business since 1879. As a master of vessels, about 18 years I have sailed on all the lakes, commanding first-class vessels—large vessels. In November and December, 1883, Crosby & Dimocks employed me. I was not the agent of the Continental Insurance Co. when I was in their employment. I first heard that the Enterprise was ashore—I think it was about four o'clock Thursday afternoon, November 29, at South Hampton. I commenced in the wrecking business in the fall of 1879. I have done wrecking for all the companies on the lakes—that is, was engaged in the hull marine business. Besides those companies—the Thames & Mersey, the Continental, the Union of Philadelphia, and the State of Pennsylvania—I have done work for Dimock; used to *ahev* my headquarters there for several companies. Most all the companies that were engaged in the hull business used to send me out to do work for them. Dimock paid me for my services. I did not look to the Continental In-

surance Company for pay at all ; have never done so. I did not when I heard of the wreck know whether the Continental had any risk upon her nor when I got to the Enterprise. I was there at South Hampton at work at the Manitoba. She was ashore. I got a telegram from Crosby & Dimock. The tug Bazile was there. The pump was taken on board from the Manitoba. The Carbry pump was placed on board of her. Captain Hutchinson was in command of that tug. I had no command of that tug nor of the men. I never paid nor did the Continental Ins. Co., to my knowledge ever pay, any of the men connected with that tug or the pump on that expedition, nor did I ever agree to pay them in behalf of the Continental Ins. Co. or otherwise. I arrived at the wreck Monday
147 afternoon, I think it was, a little after dinner or somewheres about ; on Monday afternoon, I think it was, Dec. 3rd, Capt. Lyon, the mate of the Enterprise, and two men came out to us. We learned from Lyon the condition of the boat, but I could see from where I stood she was in perfect condition. She was in good shape ; that she was in proper condition. I could see that with the naked eye. If she had been hogged I could have seen it or anything of that kind. That we often see. What we call hogging up or bent up in the middle, raised up higher than the ends. She was on a limestone rock. It is a flat rock. She was in eight feet of water or upwards. I think 13 and a half or some where abouts. I took a boat and pulled all around her. I took a pole and went around her to see if there was any plank or anything to start it off. I can tell in that way. The water there was very clear, being a white rock you could see just as clear as daylight. She lay right flat on the bottom, right straight on the bottom upright. I made this examination as she lay there before she was pumped out and while she was being pumped out. I went through her hull after she was pumped out. Both before and after she was pulled off I made a th-rough examination. I found it in good condition. There were no signs of strain whatever, so far as I could see. I saw no evidence of the springing of the ceiling or anything of that kind, There was none when we pumped her out. It was but a little while after I got the water out of her hull. The first pump was put up in the fire-hold between the engine and the boiler, and forward of the boiler is a bulkhead which runs clear to the bottom of the hull of the vessel, and there is a partition of one-inch plank and two-inch plank, and they are what they call grain tight, and after they are in the water
148 some time they get so soaked they are almost water tight, so it was hard for the water to get through this bulkhead into the fire-hold, so we cut a hole through the bulkhead to let the water pass through. The pumps had no trouble in freeing her of water. We had some pretty hard weather before we got through—before we got off the Enterprise. It came on very mild and nice weather ; Indian summer, the sailors term it. She was gotten off Thursday morning and taken on the lee of the island. I then took my knife with me and went down and searched her seams and found hey were al- perfectly tight. I think there was one place about he plankshire seam-d. There was a little oakum sticking out. I

thought it was done by a collision or something that she had came in contact with. It was done by a straining of the vessel. It was done by something hitting her there. It looked to me so. We had a load of oats on board of her, and I had a lot of men employed in throwing these oats overboard. She was dr-wing somewhere in the neighborhood of nine feet when she was loaded—forward, and more aft. I lightened her up to four feet and a half by throwing the cargo overboard, and as they were putting those s-cks onto the rail I would call to them to put the sacks one side until I could get a number of them, and then I would put them in a boat, and with a pole I used to shove those sacks down under her bottom to see if they would suck up. That is a usual test. I have gotten vessels off the rocks where neither divers nor any one else could get by using the same process to stop the leak. I have fetched them over the lakes in that way and in an heavy storm. I didn't have time to shore those limber boards down, but there was some pork aboard of her, and I took that pork and put it across the limber boards to hold her limber boards down. I thought she was fit to go anywhere. I pre-
149 ferred coming in with her in that condition—that before she went on the island—if I was to take my choice, with those two good steam-pumps on there. The best of my judgment on that condition I found the boat in and my examination of her was that the vessel was not strained. The wreck was in such condition that it was sufficient to satisfy me she was in goo- *sah*pe to go anywhere. Everything was all right as far as I examined. I didn't go under the bottom, but I knew pretty well near what was there. I could not say who gave orders to raise the tug's anchor and come away with the wreck. It was either the captain or the mate of the tug. I think the captain the orders first came from. I was not present when those orders were given. I never assumed to control him in any degree or assume the management of the tug. He used to ask me my judgment as to some things, however, and I gave it to him. I did not hear any signals on the Enterprise indicating anything wrong with the barge during the day—Sunday. I heard no signal about — o'clock in the evening. At about that time I was on the deck. If they had blown I could have heard. I was on the after part of the tug most all of the time when I was on deck. I was on the after part looking at the cargo. The first signal was given. I was standing looking at the barge when she gave her first signal. I was after on what they called the promenade deck, leaning against the rail. As I was standing leaning up against it she blew her whistle. It was about five minutes after two o'clock Monday morning. I turned to run forward, and as I got between what they call the Texas—that is, where the men sleep—and this place here I met the mate coming aft. I told him that there was something wrong on the barge and to call hands and get his boat ready. The mate opened the cabin door and the captain was lyin*g*, I think, with his clothes all on, and he jumped up and came on deck.
150 I went forward to the whistle and pulled the whistle ropes some long blasts to let them know we had heard their signal and answered them. That whistle had not been blown at any pre-

vious time. I know the capacity of those steam-pumps and how they are operated. If those two pumps were kept running their full capacity there would have been no trouble to keep the Enterprise free, none at all, in my mind. I do not know whether they were kept running; I could not see those sparks at any time during the night there, only occasionally. When the steam-pumps are running anywhere near their full capacity they throw out those sparks all the time; just a flow of fire comes out of the smoke-stack when they are working anywhere their full capacity. I saw nothing of that kind. No conversation was passed between me and the mate several time- as to that; that the barge was not leaking much because they were not pumping, were not throwing any sparks.

Cross-examination:

I did not publish that card; Crosby & Dimock'- office did. They are insurance agents in Buffalo. I carry the cards and circulate them. Crosby & Dimock are, I suppose, the general agents. (The card -entified by witness is marked "Exhibit 2" and offered in evidence.) I was engaged as marine inspector by Crosby & Dimock in 1883, for any companies they might see fit to employ me, for *for* the Continental sometimes. I want to explain my knowledge as a marine inspector: I am acting as marine inspector when the Continental is about to take a marine risk for that company. Dimock was general manager for the Continental Ins. Co.; I was acting as marine inspector for Dimock, who was the general manager of the Continental Ins. Co. I understood the Enterprise got on the
151 rocks about the 25th of Nov. There had been a storm after she had got on. I got all the freight I wanted out of her. I did not take the pork out of her hold or remove it, nor remove the ceiling from her bottom. In the morning I went outside and around her in a yawl-boat. Some of the crew were with me, I couldn't say who; I can't name a single man; I couldn't tell whether they belonged to the Enterprise or the Bazile. I know it was in the morning I made a part of the examination. It was on the morning of Wednesday on the — or of December. I don't know exactly when we started Sunday morning; I heard the captain say it was about four o'clock. I was up shortly after we started; I came out and took a look at the weather. From the time we started from the harbor on Sunday morning until the ship went down there was no storm. The Enterprise sunk in calm weather, comparatively speaking; it was light wind, a six or eight hour knot breeze. I- my judgment I think it was about three minutes from the time she blew the whistles until we were right back on top of her with the tug; I don't think it was over three minutes. When we got back there she was sunk.

Redirect:

Were battened by inch boards put around her, put up and down as far as the sheat-ing would permit us, as far down as they would reach aft. I never saw the bolts and rivets fastening that sheat-ing were started and wrenched out as testified to by some of the wit-

nesses; I never saw anything started about it; I don't see how it possibly could be and I not see it. I would deem it imprudent — take that freight out of the Enterprise to examine her bottom, for the reason the vessel laid more seaworthy with it in her, and that there was sufficient weight in that freight to keep her limber
152 boards down, and the vessel would be more —. And it was better with the freight in, as the water would come up through if there was a leak and I could locate it. It is not us-al or cur--omary to remover the freight in a vessel situated as the Enterprise; there was no evidence of water working up through it. It is not necessary to do so. I made an examination of the wheel and rudder of the Enterprise; everything was perfect.

Defendant rests.

JAMES STACKPOLE sworn on behalf of the plaintiff:

I was a member of the coroner's jury that investigated the death of John Carbry. I know Martin Delaney and heard him testify before the coroner's jury.

Q. Will you please state whether, on that occasion, in testifying before the coroner's jury Delaney swore that he had said to Captain Reardon that he didn't think it would be safe to risk taking the Enterprise across the lake?

A. Yes. I think he said it would — better not to take her.

153 It was conceded by counsel of both parties that prior to the sending of the expedition under Captain Rardon to rescue the "Enterprise" said propeller had been abandoned by her owners to the Continental Insurance Company, by whom said propeller was insured, and that said propeller had become the property of said insurance company. It was also admitted by said counsel that by reason of the sinking of said propeller at the time the said John Carbry lost his life the said propeller became and was a total loss.

And thereupon both parties rested the case.

The foregoing constitutes all the evidence offered in said cause either on behalf of plaintiff or defendant; and thereupon the court instructed the jury to find a verdict for said defendant; and said jury thereupon, without leaving their seats, returned a verdict in favor of said defendant; and thereupon counsel for said plaintiff did except to the direction and instruction of said court to the jury to render a verdict in favor of defendant as aforesaid.

And forasmuch as the testimony, rulings, and exceptions aforesaid do not appear of record in said cause the said district judge, sitting as circuit judge, has, at the request of said plaintiff's counsel, settled and sealed and signed the aforesaid bill of exceptions this fifth day of September, A. D. 1887.

HENRY B. BROWN,
District Judge.

Endorsed: 7122. Thomas Craig, adm'r, &c., *vs.* Continental Ins. Co. Bill of exceptions. Filed Sept. 5, 1887. Walter S. Harsha, clerk.

154 THE UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

THOMAS CRAIG, Administrator of the Estate of John Carbry, Deceased,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error sued out by the above-named plaintiff in the above-entitled cause that the foregoing is a true copy of the record and proceedings of said court in said cause; that I have compared the same with the original record and proceedings and it is a true and correct transcript therefrom and of the whole thereof.

Seal of the Circuit Court, Eastern District of Michigan.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 19th day of June, in the year one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth.

WALTER S. HARSHA, *Clerk.*

[Endorsed:] Thomas Craig, adm'r, *v.* Continental Ins. Co. Return to writ of error.

Endorsed on cover: E. Michigan C. C. U. S. No. 88. Thomas Craig, administrator of the estate of John Carbry, deceased, plaintiff in error, *vs.* The Continental Insurance Company of New York. Filed September 6, 1888.

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Supreme Court of the United States.

THOMAS CRAIG, Administrator of the Estate of JOHN CARBRY, deceased,
Plaintiff in Error.
vs.
CONTINENTAL INSURANCE COMPANY, of New York,
Defendant in Error.

No. 88.
October Term, 1891.

Brief for Plaintiff in Error.

DON M. DICKINSON.
Of Counsel for Plaintiff.

John F. Eby & Co., Printers, Detroit, Mich.

Supreme Court of the United States

THOMAS CRAIG, Administrator of the Estate of JOHN CARBRY, deceased,
Plaintiff in Error.
vs.
CONTINENTAL INSURANCE COMPANY, of New York.
Defendant in Error.

No. 88.
October Term, 1891.

This action was on the case for negligently causing the death of John Carbry. It was twice tried before a Court and jury, and the first trial resulted in a verdict for the plaintiff for $8,000.

The decision of the Court below on motion for a new trial (Record, p. 21) was such as to dispose of the case on the subsequent second trial, when, on the grounds stated in the Court's opinion in granting the new trial, a verdict was directed for the defendant.

The second trial was a formal re-production of the testimony of the first, for the purpose, merely, of making a record to obtain here a review of the judgment of the Circuit Court, that what is commonly known as the "Limited Liability Act" applied to the case.

We quote from the opinion of the Court below (Record, p. 21): "The most important question in this case, and one "which goes to the entire merits of the plaintiff's claim, "arises upon the request of the defendant to charge that "the 'Limited Liability Act' is a complete bar to the action. "* * * * We are entirely clear that the case is within "the act, and that the judgment should be for the defendant."

The following is the section of the Revised Statutes to be considered:

"Sec. 4283. The liability of the owner of any vessel, for "any embezzlement, loss or destruction, by any person, of "any property, goods or merchandise, shipped or put on "board of such vessel, or for any loss, damage, or injury by "collision, or for any act, matter or thing, lost, damage, "or forfeiture, done, occasioned, or incurred, without the "privity or knowledge of such owner or owners, shall in no "case exceed the amount or value of the interest of such "owner in such vessel, and her freight then pending."

The single error assigned, is upon the holding of the Court below, that this section had any application to the case at bar, and in directing a verdict for the defendant on that ground.*

Although the action was originally brought against other defendants, by the direction of the Court and the consent of counsel, on the first trial a verdict and judgment was entered in their favor, leaving as the sole defendant, The Continental Insurance Company of New York.

* As appears by the files of both counsel, an assignment of errors was duly filed within the rule, but in some way was mislaid, and the defect was not discovered until the record was printed and counsel were preparing for the argument. It has been supplied by stipulation and both the original assignment of errors and the stipulation are printed on pages 12 and 13 of this brief.

STATEMENT OF THE CASE.

The steam barge "Enterprise" was engaged in the carrying trade on the great lakes. On November 20th, 1883, while upon her last voyage for the season, in the nighttime, in a snow storm, she ran under full head upon the rocks of a small uninhabited, rocky island in the northeastern part of Lake Huron. She went on until she struck her stem against a reef. Efforts were made by her officers and crew to relieve her, but she lay there exposed to the winter storms and seas (there were three heavy gales), with a reef under her center, for from two to three weeks (Record, pp. 40, 41, 49, 53), during which time "she was straining and pounding on the rocks."

She was so broken, that as she swayed upon the rocks, a view from the camp of the wrecked sailors showed, that as the seas raised and let her down her smokestack and mast would cross each other and she was visibly "twisted around as if she was bent against the rocks" (Record, pp. 39, 41, 48). "She was wrecked so there was a difference in the "movements between the bow and the stern. The spars "would go this way, and the smokestack that."

The "Enterprise" was abandoned by her officers and crew as a total loss. It was with difficulty that the men escaped with their lives at two o'clock in the night (Record, p. 41). After the sea went down the captain took four men and the yawl, leaving the remainder of the crew in camp on this barren island, went away and never returned.

The defendant, The Continental Insurance Company had a marine policy upon the vessel, and the Marine Inspector and Wrecker for that company, having a force engaged

upon another wreck, in a different part of the lake, received notice to go to this wreck, for the company.

JOHN CARBRY, THE DECEASED,

was not a sailor and had nothing whatever to do with the sailing business. He was one of the engineers of the wrecking pumps and was brought as a part of the force of the Insurance Company, in charge of its inspector and wrecker. The Company's agent in charge, Captain Rierdon, was fully informed of all the details regarding the wreck of the ship, as appears by the evidence, and it is undisputed that he omitted every precaution usually taken in such cases for the protection of human life. We will cite hereafter some of the evidence of gross negligence in this regard. He pumped out the ship, putting a loose jacket of canvas about her without battening it,* and without any examination of her hull, and in that month of winter storms, and so far as the evidence goes, without any notice to the deceased† that he would take the ship into the open sea, started with her in the early morning in tow of his tug, passed four excellent winter harbors, and in due time, in the night, although there was no storm, the wreck went down like a shot‡ and drowned Carbry.

*Capt. Lyon, p. 43, bottom.

† Defendant's Testimony, p. 93.

‡ Captain Lyon, Record, p. 47; Wagner, p. 50, middle; Id., p. 51; Sampson, p. 53, near bottom; Defendants' witnesses, p. 72, bottom.

POINTS.

Does the "Limited Liability Act" apply not only for the protection of the owners of a *live* ship in case of her wreck and loss, but then also apply, after such wreck and loss of this same ship, for the protection against liability of the underwriters, or anyone else, from acts of gross negligence when engaged as salvors of anything of value from wreck or cargo?

If her captain and crew were justified in abandoning the "Enterprise" (a question for the jury) as a total loss, and if with the means at their command (a question for the jury) they could not have restored her to life, then she lost her character and identity as a ship, and became something else, as truly as a man who dies becomes a corpse. No rights or liabilities pertaining to living men attach to a corpse, and none attach to a total wreck at sea; although there are entirely independent bodies of law dealing with the treatment of dead men and the treatment of wrecks.

If she was a total wreck and the "Limited Liability Act" applies to the case, then it would also be applicable if the underwriters had towed Carbry out to sea upon any remnant of the ship, or any piece of her, whether it be a hull without a bottom, a bottom without the sides, or a plank or two that was under him. In the sense that the underwriters are owners by subrogation, they are the owners of every piece of the wreck, but we submit that they are not the owners in the sense contemplated by this act.

"Ships and vessels" are defined by this Court to be "all

"*navigable* structures intended for transportation."—*Cope vs. Dry Dock Company*, 119 U. S., 629.

Capen vs. Washington Insurance Company, 12 Cush., 517, was a case involving a question of implied warranty as to the condition of a vessel in marine insurance, taken when the vessel was at sea.

The Court drew the distinction between a sound, serviceable ship, and one that has ceased to be a ship by becoming a wreck. The Court, after holding that in such a case there was no implied warranty on the part of the insured, that the vessel was seaworthy "in the ordinary sense of the term," either when the policy was written or at the time when, by its terms, the risk commenced, yet there was an implied warranty that the vessel was in existence as a vessel, not lost at the time fixed for the commencement of the risk.

The Court says: "If she is at sea; when she has sailed in "a seaworthy condition, and is safe (*salvus*, not lost), so as "to be a proper subject for a contract of insurance at the "time the risk attaches; and if the vessel is in such condi-"tion, and the implied warranty to this extent is not broken, "the policy attaches and is not void. * * * "But if "the vessel was then lost, *become a wreck, or had ceased to* "*exist as a vessel*, or was, if at sea, in a condition or under "circumstances in which she could not on her arrival in "port be made available by reasonable or suitable repairs "and fitting for navigation, then there was no subject for "the policy to take effect upon, and the contract would "be void."

In *Gardner vs. Salvador*, 2 Moody & Robinson, 116 (Eng. *Nisi Prius* Rep. Exchq.), the Court in discussing the question of whether the ship's character was changed by

wreck, says: "If the situation of the ship be such "that by no means within the master's reach it can be "treated so as to retain the character of a ship, then it is a "total loss. If the captain, by means within his reach, can "make an experiment to save it, with a fair hope of restor- "ing it to the character of a ship, he cannot by selling it, "turn it into a total loss. If she be in a situation such "that, by means which the captain could reasonably use she "could not be brought to retain the character of a ship, it is "a total loss."

In the case of the steamboat Hendrick Hudson, 3 Benedict, 419, the Court discusses the loss of character of a ship in connection with the question of salvage.

The Hendrick Hudson had been a ship, was capable of floating and being towed, but had been converted into a sort of floating saloon. The Court (Blatchford, Justice,) says: "The fact that the structure has the shape of a vessel, or "had been once used as a vessel, or could, by proper appli- "ances, be again used as such, cannot affect the question. "The test is the actual status of the structure, as being "fairly engaged in commerce or navigation."

The status as a ship having rights and liabilities under the law as such may thus be lost by misfortune, as by wreck, or by the voluntary act of the owners. A ship which has become "derelict" by *wrecking* (and a ship may become derelict by simple abandonment at sea—*Judge Story in 1 Mason, 372,*) is one "where there has been an abandon- "ment by officers and crew, without hope of recovery."—*The Aquila*, 1 Rob. R., 37.

In such a case, if the underwriters had not, as in this case, become the salvors, the right of other salvors might have attached.

Are the negligences of any one in and about the retrieving of value from a *wreck* to be brought within any law relating distinctly and in terms to a "ship" or "vessel"?

Undoubtedly the test as to the wrecked ship must be whether she is capable of navigation by the use of means at hand; if she is not she has lost her character as a ship. And this question is one for the jury, as held in the two cases first above cited. As a matter of fact the evidence was conclusive upon this point. The "Enterprise" had pounded through many gales, upon the rocks, and had begun to break up so that she perceptibly showed different and independent movements of her bow and stern, of her mast and smokestack; her machinery for steaming was broken up; and she could not navigate or float either by her own means or in tow, as when towed through quiet water, she went to the bottom.

The "Limited Liability Act" above quoted, stands unaffected for the purposes of this case, by the amendment of June 26, 1884 (23 Stat. at Large, p. 56, Sec., 18), and by the Act approved June 19, 1886, extending the provisions of the Act to all vessels used on lakes or rivers for inland navigation, etc. (24 Stat. at Large, p. 80, Sec., 4).

There is no provision of the Act which can be construed as extending the provisions of the Limitation so as to include underwriters engaged in salvage.

Section, 4286, Revised Statutes, extends the meaning of owners, as used in the Act, so as to include "the charterer of any vessel, who shall man, victual, and navigate such vessel at his own expense or procurement."

We submit therefore:

First, That the "Limited Liability Act" cannot be construed to cover the case of underwriters engaged in saving wreckage; and,

Second, That it would have no application for the benefit of the original owners themselves, except for their protection from liability incurred for the cause of, or in and about the original wrecking; not for any common law liability incurred while engaged about recovering wreckage after the wreck is an accomplished fact, the character as a ship finally lost, and the vessel entirely and properly abandoned by the officers and crew.

The Evidence of Negligence and of Defendant's Connection with it.

Captain Daniel G. McAlpine (Record, p. 60), Captain Joseph Nicholson (Record, p. 29), and Thomas Craig (Record, p. 58), were disinterested experts in the wrecking business and testified as to what was proper in and about providing for the safety of life, in the conditions in which this wreck was found. No one of the methods ordinarily employed, were pursued by defendant, as shown by the testimony of the officers who were witnesses of the actual management of its agents on the ground. Captain Reardon, the wrecker of the insurance company, was fully informed of the condition of the wreck, of the time that she had pounded upon the rocks, and warned that she was broken from the pounding. Some of the people refused to go upon the "Enterprise" when requested by Captain Reardon (Record, p. 40). Captain Lyon says that Reardon asked all about the condition of the boat and that he, Lyon, told him (Record, pp. 41, 42). This witness volunteered to stay on the island during the winter, to protect the ship, rather than to have her taken out (Record, p. 47;

defendant's witnesses, p. 85). Before taking the wreck into the open sea there was no provision made for a small boat to save the lives aboard in case of sinking (Captain Lyon, Record, p. 42; Wagner, p. 50).

There was no bracing of the inner sheathing of the hull, and no examination of the bottom of the ship (Captain Lyon, Record, p. 43; re direct, p. 47; Wagner, p. 50). As shown by the experts this is absolutely essential, and an examination with divers is seldom omitted. All that was done was to pull a tarpaulin under the bottom of this broken ship, and that was not even battened or fastened, according to the testimony of Captain Lyon (Record, p. 42 and 43, bottom).

Although the wreck was towed with a tow line beyond speaking distance, there was no system of signals arranged between the tug and the wreck, as was essential, as testified to by the experts (Engineer's testimony, Record p. 55; re-direct, p. 67; Captain Lyon's testimony, p. 43, top).

All witnesses agree that no such examination was made as was testified to be necessary and feasible by the experts.

There were four convenient harbors, within easy reach, where the wreck could have been safely moored for the winter, which were passed (defendant's testimony, Record, p. 76, top; Capt. Lyon, p. 43).

Captain Reardon had entire charge of the expedition and of all the men employed in and about it, as they all say orders were taken from him and him alone (Capt. Lyon, Record, p. 41, bottom). He "took charge of the wreck and the crew, after his arrival." (Record, p. 49, near middle; p. 50, near bottom; defendant's witnesses, p. 80, near

middle; Finding of the Court on motion for new trial, p. 20).

As we have seen, so far as the evidence shows, the deceased did not know that the ship was to be towed out into the lake (Record, p. 50, middle; p. 51, near top; defendant's witnesses, p. 72, bottom; p. 83).

"Capt. Reardon, when I told him the boat's condition, "said he would take all the precaution in the world, and he "said he would only tow daytime; those are the words he "used. I did not know he was going out until the next "day, because he said the next day for us to go ashore and "get some wood" (Capt. Lyon, Record, p. 47).

The evidence of Reardon's agency for the defendant is in the proof of that company's course of business, as found by the Court (Record, p. 20); Capt. Eber Ward, one of its agents (p. 26); H. C. Munson, another of its agents (p. 28); Capt. Joseph Nicholson's testimony: the testimony of the general agents of the company (p. 55, bottom); and the admissions of counsel at p. 94.

We submit on the whole record the case was one for the jury, and that the judgment should be reversed.

DON M. DICKINSON,
Of Counsel for Plaintiff.

ASSIGNMENT OF ERRORS.

(Lost and supplied by stipulation.)

SUPREME COURT OF THE UNITED STATES.

THOMAS CRAIG, Administrator of the Estate of JOHN CARBRY, deceased,

vs.

THE CONTINENTAL INSURANCE COMPANY.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

The said plaintiff, by Dickinson, Thurber & Hosmer, his attorneys, says that in the Record and proceedings in said cause, in the court below, there is manifest error, as follows, to wit:

1. In the holding and decision of the Court that the "Limited Liability Act," so called, being Section 4283 of the Revised Statutes of the United States, had any application to the case; and

2. In directing the jury to find a verdict for the defendant.

DICKINSON, THURBER & HOSMER,
Attorneys for Plaintiff.

DON M. DICKINSON,
Of Counsel.

STIPULATION TO SUPPLY LOST ASSIGNMENT OF ERRORS.

THE SUPREME COURT OF THE UNITED STATES.

THOMAS CRAIG, Administrator,
vs.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK.

An assignment of errors having been prepared in this cause, but not appearing in the files of said cause, it is stipulated by the parties hereto that the same may be now filed as if filed within the time prescribed by the rules of Court, and with same effect as if originally filed at such time.

(Sgd) F. H. CANFIELD,
Counsel for Defendant in Error.

(Sgd) DON M. DICKINSON,
Counsel for Defendant in Error.

Office Supreme Court U. S.
FILED
OCT 27 1891

SUPREME COURT

OF THE

UNITED STATES

THOMAS CRAIG, Administrator of THE ESTATE OF JOHN CARBRY, Deceased,
Plaintiff in Error,
vs.
THE CONTINENTAL INSURANCE CO., OF NEW YORK,
Defendant in Error.

No. 88,
October Term, 1891.

Brief for Defendant in Error.

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1891.

SUPREME COURT

OF THE

UNITED STATES

THOMAS CRAIG, Administrator of THE ESTATE OF JOHN CARBRY, Deceased,
Plaintiff in Error,
vs.
THE CONTINENTAL INSURANCE CO., OF NEW YORK,
Defendant in Error.

No. 88,
October Term, 1891.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought to recover damages resulting from the death of *John Carbry*, who was the engineer of a steam-pump on the propeller or steambarge "Enterprise."

The record shows that in the year 1883, the propeller, while on a voyage from the lower lake ports to ports on the north shore of Lake Superior, was stranded on Green Island, near the upper end of Lake Huron. She had on board a full cargo of general merchandise and a crew of ten or twelve men. She was insured by the Continental Insurance Company of New York, the defendant in error. After the stranding occurred the owners of the propeller abandoned her to the insurers, and she became their property.

The general agent of the Continental Insurance Com-

pany for the lake region was Mr. *Dimick*, of Buffalo, who was also a member of the firm of *Crosby & Dimick*, general agents for several other companies.

Captain *J. J. Rardon* was employed by the firm of *Crosby & Dimick*, as a marine inspector. Among his other duties was that of going, when notified, to the assistance of wrecked and stranded vessels insured by companies represented by *Crosby & Dimick*, and getting them to a port of safety.

On November 29th, *Rardon* was at Southampton at work on the steamer "Manitoba," which was ashore at that place (Rec. 90-91), and while there received a telegram from *Crosby & Dimick* [doubtless informing him of the stranding of the "Enterprise."] At all events, he went with a tug, the "Balize," under the command of Capt. *Hutchinson* with steam-pumps and engineers to the assistance of the "Enterprise." (Rec. 91.)

One of the steam-pumps was in charge of the intestate *Carbry*. Soon after arriving at the place where the "Enterprise" lay, her crew being still on board and in charge of her, the steam-pumps were set up on board, and she was pumped out and pulled off from the place where she was stranded by the tug "Balize." No great difficulty was experienced in doing this work, which was performed under the general direction and supervision of Capt. *Rardon*. She was more or less injured by the stranding, but did not leak so badly but what she could be kept free, after being towed into deep water, by the use of one pump, from about ten o'clock, Thursday morning, until about four o'clock of the following Sunday morning.

After getting her off, the part of the cargo which had been lightered was replaced. (Rec. 43.) Her machinery was disabled, and it was necessary that the tug should take her in tow in order to get her to a port where she could be repaired. (Rec. 50.)

Accordingly, at about four o'clock of Sunday morning, the weather being favorable, the tug, still under the com-

mand of Capt. *Hutchinson*, her master, took the propeller in tow with a line astern. Two steam-pumps, one of which was in charge of *Carbry*, the intestate, were kept on board of the propeller. She had a crew of thirteen men, including four men in charge of the pumps. The mate, or first officer, was in command, the captain having left her some time previous. (Rec. 44.) *Rardon* himself was on board the tug. No trouble was experienced in the navigation of the propeller in tow of the tug for nearly 24 hours after leaving Green Island; but when she had almost crossed Saginaw Bay, and was off Pointe aux Barques, she filled and sank and was totally lost; and by reason of the sinking *Carbry* lost his life. He was twenty-two years of age. (Rec. 6.) He left surviving him his mother and four sisters, one of whom was married. The ages of the unmarried sisters at the time of the trial were respectively nineteen, seventeen and fifteen years. The mother died before the case was tried. (Rec. 26.) It was conceded at the trial by counsel for both parties that prior to the sending of the expedition under *Rardon* to rescue the "Enterprise," she had been abandoned by her owners to the defendant in error, and that she had become its property. It was also admitted by said counsel, that by reason of the sinking of said propeller, at the time said *Carbry* lost his life, said propeller became a total loss. (Rec. 94.)

The cause was twice tried before his honor, Mr. Justice Brown, then District Judge. The first trial resulted in a verdict for the plaintiff for eight thousand dollars, which was subsequently set aside, and a new trial granted. The second trial resulted in a verdict for the defendant under the charge of the Court (Rec. 94); the Court holding that as the propeller was totally lost by reason of the disaster, in which the intestate lost his life, the defendant, under the provisions of section 4283 of the U. S. Revised Statutes, limiting the liability of ship owners, could not be held liable, and that the plaintiff, therefore, was not entitled to recover. The reasons of the learned Justice are set

forth in his opinion upon the motion for a new trial. (See Rec. 20, 21 and 22.)

We submit that the judgment should be affirmed.

FIRST: BECAUSE OF THE PROVISIONS OF THE ACT OF CONGRESS REFERRED TO AND COMMONLY KNOWN AS THE LIMITED LIABILITY ACT.

SECOND: BECAUSE THE RECORD DOES NOT SHOW THAT CARBRY LOST HIS LIFE BY REASON OF ANY NEGLIGENCE ON THE PART OF THE DEFENDANT OR ITS AGENTS.

THIRD: IF THERE WAS ANY NEGLIGENCE ON THE PART OF THE DEFENDANT, *Carbry* WAS GUILTY OF SUCH CONTRIBUTORY NEGLIGENCE AS PRECLUDES ANY RECOVERY IN THIS CASE.

FOURTH: *Captain Rardon*, OF WHOSE NEGLIGENCE THE PLAINTIFF COMPLAINS, WAS A FELLOW-SERVANT OF *Carbry*, AND THEREFORE THE PLAINTIFF CANNOT RECOVER.

FIFTH: THERE WAS NO EVIDENCE THAT THE DEATH OF *Carbry* RESULTED IN ANY PECUNIARY LOSS OR DAMAGE TO HIS SISTERS, FOR WHOSE BENEFIT THE SUIT IS PROSECUTED, AND THEREFORE, NO RIGHT OF RECOVERY IS SHOWN ON THE PART OF THE PLAINTIFF.

In behalf of the defendant, I submit that this ruling was correct, and that the judgment should be affirmed.

I.

THE ACT OF CONGRESS LIMITING THE LIABILITY OF SHIP OWNERS IS A COMPLETE DEFENSE TO THIS ACTION, AND THE COURT, THEREFORE, PROPERLY DIRECTED THE VERDICT FOR THE DEFENDANT.

This statute (Rev. Stat., § 4283) has been so frequently considered and passed upon by this Court, that an extended discussion in this case is unnecessary. It declares that

"The liability of the owner of any vessel, for *any* embezzlement, loss, or destruction, by any person, of any property, goods, or merchan-

dise, shipped or put on board of such vessel, or for *any loss, damage*, or injury by collision, or for *any* act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall, in no case, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Under this statute, no liability exists on the part of the owner, nor can any recovery be had against him in any action for *any* loss or damage, or for *any* injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, occasioned without the privity and knowledge of such owner or owners, beyond the amount or value of the interest of such owner in the vessel and her freight then pending. If the vessel herself is totally lost, no liability remains on the part of her owners, if they are personally without fault.

Now, the plaintiff himself, by his own pleading and evidence, shows that the intestate, at the time of the disaster, was on board the propeller "Enterprise": that she was a steam vessel 180 feet long, (Rec. 36,) engaged in the navigation of the great lakes and connecting waters; that she was fully officered and manned; that she had on board a cargo of merchandise; that she was owned by the defendant, a corporation under the laws of the State of New York, and that she was totally lost by reason of the disaster in which the intestate lost his life. These facts are alleged and proved *by the plaintiff himself* in attempting to make out his own case. The plaintiff, therefore, proves a case which comes within the statute.

That the statute applies to cases of personal injury and death, as well as to cases of loss of, or injury to property, has been repeatedly decided.

In BUTLER vs. BOSTON STEAMSHIP CO., 130 U. S., 527-562, this was directly held The Court say:

"We think that the law of Limited Liability applies to cases of personal injury and death as well as to cases of loss of or injury to property."

See also,

The Epsilon, 6 Ben., 378.
Rounds vs. Providence & Stonington Steamship Co., 14 R. I., 344.
In re Long Island, etc., Co., 5 Fed. R., 500.
The City of Columbus, 22 Fed. R., 460
The Alpena, 10 Biss., 436.

And such is the ruling of the Court of Appeals under the English statute.

The L. & S. W. Ry. Co., L. R. 8 Chy. Appeal Cases, 241.

1. *The "Enterprise" was a vessel within the provisions of the Statute.*

As already stated, she was a steam vessel engaged in the business of commerce and navigation upon the great lakes. At the time she was stranded at Green Island she was regularly officered and manned, and had on board a full cargo consigned to Lake Superior ports. (Rec. 40.) She still had a large portion, if not the larger portion of this cargo on board, when she was lost. Her crew were still on board of her. Her mate was in command.

That vessels navigating the great lakes are within the statute has been frequently decided.

Moore vs. Navigation Co., 24 How. 1.
American Transportation Co. vs. Moore, 5 Mich., 368

The suggestion that the statute does not apply to the "Enterprise" because she had been stranded and was being taken to a port for repairs, is properly disposed of by the learned Judge in his opinion upon the motion for a new trial. (Rec. 21.)

It is not uncommon for vessels navigating the lakes to become stranded, but such accidents ought not to remove the protection which the statute throws around their owners. The "Enterprise," in this case, while seriously damaged by reason of the stranding, could probably have been navigated to a port of repairs without the assistance of the tug, if her machinery had not been disabled. She was not leaking so badly but that one pump could keep her free without difficulty, if it was properly attended to.

While being navigated across the lake in tow of the tug, as already stated, the mate was in command. (Rec. 44.) He testifies: "There was not a large quantity of coal on deck which the pumps could use before we started from Green Island. The whole crew turned in then and went to bed, with the exception of myself, the wheelsman and one man to pass coal."

This shows that the officers and crew of the "Enterprise" regarded her not only as being "still a vessel," but as being a pretty good and safe one. They may have been over confident. Indeed, it is impossible to escape the conclusion, that if they had properly attended to their duty,—if they had paid proper attention to their pumps and kept them running, the "Enterprise" would not have been lost.

2. *The loss and damage complained of in this case was not occasioned by, or incurred with, "the privity or knowledge" of the defendant corporation, the owner of the "Enterprise," and therefore the plaintiff cannot recover, it being shown that the ship herself was totally lost.*

The object of the statute was to limit the liability of ship-owners for loss or damage which was occasioned without their "privity or knowledge." It embraces all loss or damage resulting from the carelessness or negligence of the master or crew of the vessel or *other employees* of the owner. In order to take the case out of the statute there

must be a "personal concurrence" or some fault or negligence on the part of the owner himself, which occasioned the loss.

The words "privity or knowledge" as used in the statute mean a personal participation of the owner in some fault or act of negligence causing or contributing to the loss.

Lord vs. G. N. & P. S. Co., 4 Sawyer, 300

Where the owner is a corporation the privity or knowledge which is necessary to take the case out of the statute must be the privity or knowledge of the *managing officers of the corporation.*

Lord vs. G. N. & P. S. Co., 4 Sawyer, 302.
Hill Mnfg. Co. vs. Providence & N. Y. S. S. Co., 113 Mass. 245.

It is well settled that the owners of the vessel are entitled to the protection of the act notwithstanding the negligence of their officers and crew.

In WALKER VS. TRANSPORTATION CO., 3 Wall, 150. it is said that the purpose of the sections of the act relating to loss by fire is,—

"to release the owner from some liability for conduct of the master and *other agents* of the owner, for which those parties were themselves liable, and were to remain so, and that is stated to be either negligence or fraud."

Most of the cases involving the construction of this statute, which have been before the courts, have been those in which the vessels were owned by corporations, and it has been universally held that the corporation was protected against loss or damage arising from the fault or negligence of the master or the employee to the same extent that the owner would be protected if a private citizen.

The only negligence complained of in this case is the assumed negligence of *Rardon* in attempting to tow the propeller in her damaged condition from the place where

she was stranded to a port of repair. But *Rardon* was not an officer of the corporation, or even employed directly by the corporation, but by *Dimick*, or *Crosby & Dimick*, the agents at Buffalo. He never looked to the corporation for his pay, but to *Dimick*. When he went to the "Enterprise" in obedience to the telegram which he had received from *Crosby & Dimick*, he did not know that she was insured by the defendant. Rec. 90 91. But if we admit that *Rardon* is to be regarded as the employee of the defendant and as its agent, he was nevertheless nothing more than a mere employee. He was not an officer of the Company. He was at most a mere foreman.

As is well said in the opinion of the Court (Rec. 22):

"So far as the record shows, neither the president nor the directors of this corporation had any knowledge of his appointment. His powers were no greater than those of the master of a vessel whose authority to employ assistance when his ship is stranded is beyond dispute. If the owner had been an individual instead of a corporation it would have seemed clearer that Rardon did not stand in his place, but the law applicable to the case would be the same."

The authority of *Rardon* in this case was not so great as that of the master of a vessel, and he no more stood in the place of the owner, and no more represented the owner, than a master does who assumes to relieve the ship which he commands when she has been accidentally stranded. If the fault or negligence, or the privity or knowledge, of the master is not to be regarded as the fault or negligence or privity of the owner, for which the owner would be liable, it follows, that the owner is not to be held liable for the fault or negligence of such an employee as *Rardon;* nor is his privity or knowledge or negligence regarded as the privity or knowledge or negligence of the owner, although such owner be a corporation.

The words "privity or knowledge" used in the statute are synonymous. Privity, as defined by Webster, means *private knowledge*. An act cannot be committed with the privity of the owner unless it be committed with his private know-

ledge. The knowledge of such an employee as *Rardon* is not the private knowledge of his employer, even if that employer be a corporation. Notice to, and knowledge of, such an employee would not be notice to, nor knowledge of, the principal, although the principal is a corporation.

The statute provides that the owner shall not be liable beyond his interest in the vessel and her freight for any embezzlement or destruction by any person of any property, goods or merchandise, shipped or put on board such vessel, without the privity or knowledge of such owner. This includes embezzlement by any officer or agent of the owners employed on board the vessel. Of course, they could not commit embezzlement without being themselves privy to the act. Now if the privity or knowledge of the officers or agents of the owner is not to be treated as the privity and knowledge of the owners themselves in respect to embezzlement, neither can their knowledge or privity respecting any other loss or damage which may occur, be regarded as the privity or knowledge of the owners.

In "THE WARKWORTH," L. R. 9 Probate Div. 20, under the English statute, Butt, J. said:

"*Prima facie*, I do not see why the amount of relief afforded should be limited to a case where damage has occurred through the negligence of the officers and crew, and why the act should not apply to the negligence of persons employed in preparing a ship for the voyage, such as an engineer, other than the regular engineer of the ship, who has been called in to repair or overhaul the engines at the dock."

In WILSON vs. DICKSON, 2 Barn. & Ald. 2, it was held, in an action against several defendants as ship owners for damage sustained by the loss of goods ladened on board their ship, that they were not liable in that character beyond the value of the ship and the freight due or to grow due, although the loss was occasioned by the misconduct of one of the defendents *who was both master and part owner.*

See also London & S. W. Railway Co. vs. James, L. R., 8 Ch. App. 241.

The law of limited liability is the general law of this country, and the ship owner is entitled to its protection in every case where it is applicable. If the vessel has not been totally lost, and the owner desires to initiate proceedings under the statute, it is necessary for him to file his petition or libel in the Admiralty, as provided by the rules adopted by this Court. But where the loss of the ship and freight is *total*, as in this case, and the owner thereby relieved of all liability, he may rely upon the statute as *a defense* without pleading it. Especially is this true, where, as in this case, the *plaintiff by his own allegations and evidence* proves a case of total loss within the statute.

In THE SCOTLAND, 105 U. S., 34, it is said, that

"The law contains two distinct and independent provisions on the subject. One is, that the ship owners shall be liable only for the value of the ship and freight; and the other is, that they may be discharged altogether by surrendering the ship and freight. If they fail to avail themselves of the latter, they are still entitled to the benefit of the former kind of relief."

In PROVIDENCE & N. Y. S. S. CO. vs. HILL MNFG CO., 109 U. S., 578, it is said at page 594, that

"Cases might occur, in which the ship owners could avail themselves of those benefits by way of *defense alone*, as where both ship and freight are totally lost, so that the owners are relieved from all liability whatever."

We submit under this decision, that the owners being relieved from all liability whatever in cases where both ship and freight are totally lost, no action can be maintained against them; and therefore, the Court properly directed a verdict in this case for the defendant.

In WILSON vs. DICKSON, 2 Barn. & Ald., 2, decided in 1818, the declaration, as in the case at bar was in tort. Plea as in the case at bar was the general issue; and it was held that the defendants were entitled to the protection of the statute.

Even where the defense is based upon *special* statute, the defendant is entitled to judgment without pleading the statute, if the *plaintiff by his own evidence* proves a case, which is covered by the statute.

But the law limiting the liability of ship owners is not to be regarded as a special statute. It is a part of the general maritime law of the country. It is a law of which the courts are bound to take notice and enforce, in a case like this, without its being specially pleaded. However, the point that the statute was not pleaded as a defense was not urged or taken in the court below, and it may not be relied upon now by plaintiff's counsel.

II.

THE RECORD DOES NOT SHOW THAT CARBRY LOST HIS LIFE BY REASON OF ANY NEGLIGENCE ON THE PART OF THE DEFENDANT, OR ITS AGENTS, FOR WHICH THE DEFENDANT IS LIABLE.

It is shown that Green Island, where the "Enterprise" was stranded, is a small island in the northern part of Lake Huron. The island is uninhabited. There were no means of repairing the vessel there, nor even to care for her. It was necessary that she should be taken to some port at which there was a dry-dock. And to take her to such a place it was necessary to tow her across Lake Huron. (Rec. 24-35). When *Rardon* reached the "Enterprise" a portion of the crew at least were encamped on shore. (Rec. 39-42-48). It was necessary that both the ship and the cargo should be taken to a port of repair.

After *Rardon* arrived at the "Enterprise" the steam-pumps were put on board of her. The seacocks which had been open were turned off. The water was pumped out (Rec. 49) and the tug pulled her off and towed her into deep water under the lee of the island. She lay in deep water from ten o'clock on Thursday until the next Sunday morning at about four o'clock. (Rec. 72-73). In the mean time she was carefully examined by Capt. Rardon and by Capt. Hutchinson, the master of the steam-tug. (Rec. 72). Sails were used to jacket her in order to prevent leaking. During the three days in which she

lay under the lee of the island, one pump was sufficient to keep her free from water. At four o'clock on Sunday morning, the weather being fine, the tug started to cross the lake with the propeller in tow. As already stated the propeller remained in command of her mate, and the crew, with the exception of the cook, were on board of her, as were also four men who had charge of the two steam-pumps. Rec. 44-51. During all day Sunday, while she was being navigated across the lake, one pump was sufficient to keep her free. (Rec. 51-79).

It is admitted (Rec. 89) that *Rardon* was a good, competent seaman, and an excellent wrecker. It is shown that he made an examination of the propeller (Rec. 91), and that to the best of his judgment, based upon such examination, she was in a proper condition to be taken across the lake. (Rec. 92).

Capt. Hutchinson, the master of the steam tug, agreed with him in this opinion. (Rec. 75). *Lyon*, the mate of the "Enterprise," plaintiff's witness, seems to have been of the same opinion. *Wagner*, plaintiff's witness, employed as a seaman on the "Enterprise," (Rec. 51), says: "I did not have any thought or fear of the loss of the barge during the day. I did not consider there was any danger."

Charles Conroy, mate of the tug "Balize," went on board the "Enterprise" with the steam-pumps (Rec. 71), and says he was working in her hold.

"I saw no break in her sheathing nor anything in her ceiling to indicate that there was a break in her outside planking. I went outside of her with a part of the crew. We put the jacket around her. I made an inspection of her hull outside. Her seams looked all right to me. I saw no break at all in the boat. The jackets were battened with inch pieces. Some of the battens were two or three inches wide." On page 78 he says: "I saw nothing until just before the sinking of the 'Enterprise' to cause me any alarm."

Capt. Nicholson, plaintiff's expert, testifies: (Rec. 36). "That upon the facts stated he would not consider it imprudent to attempt to tow the 'Enterprise' across the lake to a port of repair."

McAlpin, another of plaintiff's experts, testifies (Rec. 64):

"It is a common thing to take a vessel a distance of 200 miles across the lake leaking so badly, that it requires more than one pump to keep her free; no doubt about that. But you generally know where your leaks come from. I have towed stranded vessels across the lake, where I had to keep more than one pump going all the time.

Q. Suppose a vessel upon the rocks,—upon the kind of rocks I have described at Green Island; two pumps free her in four or five hours, and she is pulled into deep water, and one pump keeps her free from that time, say, Thursday morning until she starts at four o'clock Sunday morning, and then keeps her free while being towed from Green Island down, until they get off Port Austin light, no difficulty being experienced up to that time; the weather continuing good. Suppose the vessel was leaking so badly as to make it necessary to attempt to bring her into a port of repair, there being another pump aboard, to use in case of an emergency, would you think that imprudent?

A. Well, I should consider that vessel was not leaking so very badly, of course; but you are aware we have had instances here, where there have been stone and rocks and boulders in a vessel's bottom by reason of being on a rocky bottom. If I got down in the neighborhood of Port Austin light, no trouble having been experienced up to that time, I would consider myself justified in continuing with the vessel for Detroit or Port Huron. If I had got down half way across Saginaw Bay, under those circumstances one pump keeping the vessel free, there being another pump on board, and the weather being good, I would come right on. That would be strong evidence, would it not, that she was not leaking so badly, but that she might come along?"

Capt. Martin Swain, an experienced tug master and wrecker (Rec. 89), testifies:

"If one pump was sufficient to keep the 'Enterprise' free from water, and the "Enterprise" had been pumped out in one hour or two hours, and that one pump kept her free thereafter from Thursday morning until Sunday morning, while lying in deep water, and from Sunday morning until six o'clock, Sunday evening, I think there was no danger in bringing the 'Enterprise,' if she had one pump to spare, and

with the jackets on, and a strict watch kept on the pump, and I was there and knew how fast it would go in. I don't think it would. It was good seamanship to go to sea with two pumps, only using one and having the other ready to start, if necessary. If you let the steam go down and didn't keep close track of the water, that, of course, would make a difference."

It is admitted that *Rardon* was a competent wrecking master. It cannot be doubted from the evidence that he exercised his best judgment in what he did. The fact that the "Enterprise" sank nearly twenty-four hours after she left Green Island is not of itself proof of such negligence as will make defendant liable.

III.

IF THERE WAS ANY NEGLIGENCE ON THE PART OF THE DEFENDANT, CARBRY WAS GUILTY OF SUCH CONTRIBUTORY NEGLIGENCE AS PRECLUDES ANY RECOVERY IN THIS CASE.

He was a steam-pump engineer of considerable experience. He had been engaged in a wrecking expedition immediately before going to the "Enterprise." He must have known the condition of the propeller. He was on board of her and had charge of one of the steam-pumps, (Rec. 46), and, of all the men on board, must have known how badly the propeller was leaking. If it was dangerous to attempt to take the "Enterprise" across the lake he must have been aware of the fact; at least he had as good an opportunity to judge as *Rardon* did. He voluntarily encountered whatever danger there was attendant upon the undertaking.

Simpson, engineer of the propeller, plaintiff's witness, (Rec. 54), says:

"We were waiting up there from Saturday until Sunday morning for fine weather to take the 'Enterprise' away. Did not know where we were going. Some one told me it was down to Owen Sound and some to Port Huron. The matter was generally talked about among

the men. They all understood it. All expected to start as soon as the weather got calm. They kept one pump running until six o'clock Sunday afternoon. The other pump used to run when the other pump stopped to clean out their fire or something or another. The other pump started during the time the other one stopped. It was *Carbry's* pump that was run during the day. I talked with *Carbry* about keeping the pumps running. When I woke up the second engineer told me the pump had stopped, so I came down stairs and asked young *Carbry* why he kept the pumps stopped so long. He told me it was none of my business. I told him it was my business, because our lives were in danger and I would like to be safe. He told me he did not care about the boat going down. He says, I have a friend on deck that will throw me a line and we will be safe. And I went on and started the pump forward."

James M. Sargent, (Rec. 79), testifies to having talked with *Carbry* about bringing the propeller down and that he did not hear him make any objections to going down with her.

It clearly appears that *Carbry* knew, or had the opportunity of knowing, the condition of the propeller, and that in going down the lake aboard of her with his steam-pump he acted voluntarily. If there was danger he must have been aware of it.

The business of assisting wrecked and stranded vessels upon the great lakes, as well as upon the ocean, and getting them into port, is always a dangerous business. Those who engage in it, are performing a service in the nature of salvage, in which the compensation is usually dependent upon the degree of the danger to be encountered. And in the absence of an express contract, they must be presumed to assume all the risks of the employment.

In WHARTON ON NEGLIGENCE, § 214, it is said:

"When an employee, after having the opportunity of becoming "acquainted with the risks of his situation, accepts them, he cannot "complain, if he is subsequently injured by such exposure. An "employee who contracts for the performance of hazardous duties, "assumes such risks as are incident to their discharge from causes "open and obvious, the dangerous character of which he has had an "opportunity to ascertain."

In THOMPSON ON NEGLIGENCE, 1008, it is said:

"If the servant, before he enters the service knows, or if he after-
"wards discovers, or if by the exercise of ordinary observation or rea-
"sonable skill and diligence in his department of service, he may discover
"that the building, premises, machine, or fellow-servant in connec-
"tion with which or with whom he is to labor, is unsafe or unfit in any
"particular, and if notwithstanding such knowledge, or means of knowl-
"edge, he voluntarily enters into or continues in the employment with-
"out objection or complaint, he is deemed to have waived any claim for
"damages against the master, in case it shall result in injury to him."

Tuttle vs. Milwaukee Railway, 122 U. S., 189.
R. R. Co. vs. Barber, 5 Ohio St., 541.
Owen vs. R. R., Lansing, 108.
Greenleaf vs. R. R., 29 Iowa, 14.
Williams vs. Clough, 3 H. & N., 258.
Hayden vs. Manf. Co., 29 Conn., 548.
Fifield vs. R. R., 42 N. H., 240.
Laning vs. R. R., 49 N. Y., 534.
Buzzell vs. Manf. Co., 48 Me., 113, 121.
Simmons vs. R. R. Co., 110 Ill., 340.
Richards vs. Rough, 53 Mich., 212.
M. C. R. Co. vs. Austin, 40 Mich., 247.

IV.

Carbry AND *Rardon* ARE TO BE REGARDED AS FELLOW-SERVANTS, AND THEREFORE THE PLAINTIFF CANNOT RECOVER EVEN IF *Rardon* WAS NEGLIGENT.

While the evidence shows that *Rardon* had general supervision of the work, his authority was no greater than that of an ordinary foreman or boss. There is no proof that he hired *Carbry* or had any authority to discharge him. *Carbry's* steam-pump was a part of the wrecking tug's outfit. Both he and *Rardon* were working together for a common purpose. And although *Rardon* may have supervised and given general directions, as to what should be done, nevertheless, he was a fellow-servant with *Carbry*: if, indeed, the law of master and servant applies at all to this case.

Beach on Contributory Negligence, sec. 116.
5 Armour vs. Hahn, 111 U. S., 313.

V.

THERE WAS NO EVIDENCE THAT THE DEATH OF *Curbry* RESULTED IN ANY PECUNIARY LOSS OR DAMAGE TO HIS SISTERS, FOR WHOSE BENEFIT THE SUIT IS PROSECUTED, AND THEREFORE NO RIGHT OF RECOVERY IS SHOWN IN BEHALF OF THE PLAINTIFF.

The statute of Michigan, 2 How. Anno. Stat. §8314, provides that "in every such action the jury may give such damages as they may deem fair and just, with reference to the *pecuniary* injury resulting from such death, to those persons who may be entitled to such damages when recovered."

In construing this statute the Supreme Court of Michigan in *Mynning vs. Detroit, L. & N. R. Co.*, 59 Mich. 257, say:

"It will be noticed that the language of the statute includes only such damages as may be recompensed by *pecuniary* compensation, not exceeding the statutory amount; and which should be based upon some well-defined facts or known circumstances in the case—such facts as are susceptible of some proof under the well-settled rules governing the admissibility of testimony."

The declaration avers that the deceased was of the age of 22 years and left surviving him three minor sisters and his mother. All that the testimony shows is that *Curbry* was a strong, healthy man and that the sisters were respectively of the age of 15, 17 and 19 years. There is no evidence that the intestate ever contributed a cent for the support of his sisters, or that they were in any way dependent upon him, therefore there was an entire want of evidence *in respect to any pecuniary injury* resulting to them from the death of the intestate. A verdict in favor of the plaintiff would not have been based upon sufficient evidence, but upon the mere conjecture or sympathy of the jury.

In R. R. Co. vs. WELDON, 52 Ill., 290, it is said that either evidence must be given of the profits of the labor of the deceased, or what he might in all probability earn for

the support of his wife and children. The jury have no right to find arbitrarily that the death of the husband and father results in a pecuniary loss to his widow and next of kin.

See also R. R. Co. vs. Austin, 69 Ill., 429.
Mitchell vs. N. Y. &c., R. R. Co., 2 Hun 535 affirmed in 64 N. Y. 655.
McIntyre vs. R. R. Co., 37 N. Y. 287.

Upon the whole case, we submit that no error is shown in the ruling of the court below, and that the judgment should be affirmed.

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